The University of the State of New York

The State Education Department
State Review Officer
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No. 20-174

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

Appearances:
Law Offices of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which determined that the educational program and related services respondent's (the district's) Committee on Preschool Special Education (CPSE) and the Committee on Special Education (CSE) recommended, respectively, for the student for the 2017-18 and 2018-19 school years were appropriate. The district cross-appeals from that portion of the IHO's decision which awarded the parents with assistive technology services as relief. The appeal must be sustained in part, the cross-appeal must be sustained, and, as explained more fully below, the matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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]).[1] 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[a]). 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]).

[1] Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local CPSE that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804).

III. Facts and Procedural History

The student in this case began receiving special education services in infancy through the Early Intervention (EI) program to address her developmental delays (see Parent Ex. J at pp. 1-2). In or around April 2016, the parents referred the student to the CPSE in anticipation of the student's transition from receiving EI services to her receipt of CPSE (preschool-aged) services; at that time, the student's EI services consisted of one 30-minute session of "special instruction," two 30-minute sessions of "speech/feeding therapy," two 30-minute sessions of occupational therapy (OT), and two 30-minute sessions of physical therapy (PT) (id.). The evidence in the hearing record reflects that the parents referred the student for CPSE assessment "due to concerns regarding her communication skills, motor abilities, adaptive skills and cognitive development" (id. at p. 1). As part of the evaluation process, the CPSE conducted the following assessments of the student: an April 2016 bilingual psychological-educational evaluation (with an April 2016 addendum), an April 2016 bilingual social history, an April 2016 observation of the student, a May 2016 PT evaluation, a May 2016 OT evaluation, and a May 2016 bilingual speech-language and feeding evaluation (see generally Parent Exs. K-M; O-Q; S).[2]

Finding the student eligible for special education as a preschool student with a disability, the student began attending a preschool program at ADAPT Community Network (ADAPT), a State-approved nonpublic school, in September 2016 for the 2016-17 school year (see Tr. pp. 465-67; Dist. Exs. 1 at p. 3; 11 at p. 1; see generally Dist. Exs. 8-11; 13; Parent Ex. T). According to the evidence in the hearing record, the student attended a 12-month school year program in a 12:1+3 special class placement at ADAPT, and received the following related services: three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual OT, and three 30-minute sessions per week of individual speech-language therapy (see Dist. Exs. 8 at pp. 1-2; 9 at p. 1; 10 at pp. 1, 3; 11 at p. 1). Based upon an annual education report (undated) prepared by the student's then-current special education classroom teacher for an "annual review of her program" by a CPSE, the student's cognitive development, language development, fine motor and gross motor skills, social/emotional development, and self-help skills, were assessed to fall "under the 12 month[s of age] level" and represented a "greater than 33" percent delay, respectively, in each area (Dist. Ex. 11 at pp. 1-3; see Tr. pp. 465-67).[3]

On July 24, 2017, a CPSE convened and developed an IEP, which reflected a projected implementation date of July 24, 2017 and a projected annual review date of July 24, 2018 (see Dist. Ex. 7 at p. 2).[4] Finding that the student remained eligible for special education as a preschool

[2] The hearing record also included a May 2016 "Preschool Student Evaluation Summary Report" that briefly summarized the information from the noted evaluations, as well as a document reflecting a packet of materials sent to the CPSE chairperson, which included a draft IEP (Parent Ex. N at p. 1; see generally Parent Ex. R).

[3] According to the annual education report, the "developmental information and norms contained in th[e] report [were] based on current observations by her classroom teacher and [were] referenced by the HELP Checklist, 0-3 and The Brigance Inventory, Birth-Three" (Dist. Ex. 11 at p. 1).

[4] Regardless of the projected implementation and annual review dates noted in the July 2017 IEP—which presumably reflect the intention to implement the IEP for an entire school year—the notations made on the first page of that document (entitled "Summary") confuse this presumption (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 7 at p. 2). This is because the "Summary" page denotes "July/August 2017 Only" for all of the recommended special education programs and related services (Dist. Ex. 7 at p. 1). Notwithstanding this unexplained

student with a disability, the July 2017 CPSE recommended a 12:1+3 special class placement (five hours daily, located within an "[a]pproved [s]pecial [e]ducation [p]rogram"), and the following related services: three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT; and the services of a full-time, individual crisis aide (id. at p. 10).[5] According to the evidence in the hearing record, the student remained at ADAPT during the 2017-18 school year and received services pursuant to the July 2017 IEP (see Dist. Ex. 1 at p. 3; see generally Parent Exs. D-G; Dist. Exs. 5-6; 14-17).[6]

By final notice of recommendation dated July 24, 2017, the district identified ADAPT as the location within which the student's CPSE IEP would be implemented (see Parent Ex. V).

On March 6, 2018, a CSE convened and developed an IEP for the student's transition to receiving school-aged services for kindergarten during the 2018-19 school year; the March 2018 IEP reflected a projected implementation date of September 1, 2018 and a projected annual review date of March 7, 2019 (Dist. Ex. 2 at pp. 1, 15).[7] Finding the student eligible for special education as a student with multiple disabilities, the March 2018 CSE recommended a 12-month school year program in a 12:1+(3:1) special class placement at a district specialized school, with the following related services: three 30-minute sessions per week of individual OT, three 30-minute sessions per

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discrepancy, for ease of reference, it will be inferred throughout this decision that the July 2017 IEP was created at an annual review and was intended as recommendations for the entirety of the 12-month school year for 2017-18.

[5] Similar to the "Summary" page, the July 2017 IEP includes other, similarly confusing notations in the "Student Needs Relating to Special Factors" section (compare Dist. Ex. 7 at p. 1, with Dist. Ex. 7 at pp. 3-4). Initially, the July 2017 IEP contains two pages documenting the student's needs in this area (as well as the student's management needs) (see Dist. Ex. 7 at pp. 3-4). On the first of these two pages, the July 2017 CPSE simultaneously noted—by making an "X" in boxes labeled "Yes" and "No"—whether the student required "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of other" (id. at p. 3). In response to the same inquiry on the second page documenting these same needs, the July 2017 CPSE indicated—by making an "X" only in the box labeled "No"—that the student did not require "strategies, including positive behavioral interventions, supports and other strategies to address behaviors that impede[d] the student's learning or that of other" (id. at p. 4). On both pages, the July 2017 CPSE reflected that the student did not require a behavioral intervention plan (BIP) (id. at pp. 3-4). According to the evidence in the hearing record, a school psychologist at ADAPT had developed a BIP for the student, dated March 17, 2017, addressing the student's target behavior of placing her "hands inside [her] mouth and pulling hair during therapy sessions when novel activities [were] being introduced in the classroom" (Dist. Ex. 13 at p. 1). Within the BIP, the school psychologist noted that while the student's behavior was "not disruptive to others, it [was] not allowing her to develop her oral motor, fine motor, and gross motor skills, or to learn new tasks in the classroom" (id. at pp. 1-2). To reduce and ultimately eliminate these behaviors, the BIP called for placing "soft elbow splints" on the student's arms during therapy sessions, for no more than 30 minutes at a time, and "only . . . when absolutely necessary for increased focus and participation" (id. at p. 2).

[6] The student had the same preschool teacher for the 2016-17 and 2017-18 school years at ADAPT (see Tr. pp. 465-66).

[7] Throughout the hearing record, the March 2018 CSE meeting was also referred to as the student's "turning five" meeting (see, e.g., Tr. pp. 24-25, 34). At the impartial hearing, the district school psychologist who attended the March 2018 CSE meeting explained the turning five process as "transferring the educational—special education information from pre-K to kindergarten for the kids to continue their—to continue or to see if this [was] appropriate services for kindergarten" (Tr. pp. 34-35).

week of individual PT; three 30-minute sessions per week of individual speech-language therapy; and the services of a full-time, individual health paraprofessional (for ambulation, feeding, and crisis) (id. at pp. 10-11, 15).[8] In addition, the March 2018 CSE created annual goals with short-term objectives to address the student's areas of need and recommended special transportation (a lift bus, door-to-door transport, walking aids, and a wheelchair) (id. at pp. 5-9, 15). Finally, the March 2018 IEP noted the parents' concerns, including their desire for the student to "continue in [her] current school" and that the student would "not receive pool therapy" (id. at p. 17).

In a prior written notice to the parents dated March 16, 2018 (March 2018 prior written notice), the district summarized the special education recommended for the 2018-19 school year (beginning September 2018) (see Dist. Ex. 3 at pp. 1-2). In addition, the March 2018 prior written notice listed the following as the evaluations, assessments, records, or reports relied upon by the March 2018 CSE: a February 4, 2018 classroom observation (February 2018 classroom observation), a December 19, 2017 OT progress report (December 2017 OT progress report), a December 19, 2017 PT progress report (December 2017 PT progress report), a January 4, 2018 speech-language progress report (January 2018 speech-language progress report), and a January 16, 2018 annual educational report (January 2018 annual educational report) (id. at p. 2).[9]

By letter dated March 29, 2018, ADAPT noted that it could provide the student with "an appropriate placement of 12:1:4" beginning in September 2018 for kindergarten, as well as the related services of speech-language therapy, OT, and PT as mandated in the March 2018 IEP (Parent Ex. C).

In a subsequent prior written notice/school location letter sent to the parents dated May 24, 2018, the district identified the particular district public school site within which the student's March 2018 IEP would be implemented (see Dist. Ex. 4 at p. 1). According to the notice, the "school listed [] was chosen because it c[ould] provide the program and services on [the student's] IEP" and that the student's March 2018 IEP had been used, in part, in making this decision (id. at p. 2). The notice further indicated that the district also "considered factors including, but not

[8] Throughout the hearing record, the recommended 12:1+(3:1) special class placement was also referred to as a 12:1+4 special class placement (see, e.g., Tr. p. 26, 41, 214, 220). At the impartial hearing, the district school psychologist described the 12:1+4 special class placement as a "program for students with severe and significant needs that need[ed] the attention of a—that need[ed] the one-to-one attention and that ha[d] medical issues" requiring the "supervision of more of those adults in the room" (Tr. p. 41). She explained that the ratio reflected "12 students, 1 teacher, and 3 assistants, plus another person and that person w[ould] be supporting the classroom as well" (Tr. p. 41). The student's eligibility for special education programs and related services as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[9] It appears that the March 2018 prior written notice contains typographical errors regarding the specific dates of the December 2017 OT progress report—documented as "December 19, 2018" when the report, itself, was dated "December 18, 2017"—and the February 4, 2018 classroom observation, when the report, itself, reflected that the observation took place on February 19, 2018, but noted that the date of the report was February 4, 2018 (compare Dist. Ex. 3 at p. 2, with Parent Ex. E at p. 1, and Dist. Ex. 5). In addition, while all three of the related services documents were generically referred to as progress reports within the prior written notice, all of the reports (including the January 2018 annual educational report) noted the use of evaluative or assessment materials (see Parent Ex. D at p. 1; E at p. 1; F at p. 1; G at p. 1), and at least two of the related services reports were actually titled as evaluations—namely, the December 2017 PT Evaluation (see Parent Ex. D at p. 1) and the January 2018 "Speech/Language and Feeding Evaluation" (Parent Ex. F at p. 1). For clarity, the documents noted in the prior written notice will be referred to as "progress reports" throughout this decision.

limited to, the T5 application process, the students zoned school and, accessibility needs of the student" (id.).

In a letter dated May 24, 2018 (May 2018 letter), a physical therapist at ADAPT wrote to recommend that the student receive "aquatic pool therapy," noting that the student would "benefit immensely" and that the "buoyance of the water w[ould] assist to improve her range of motion, muscle strength, and coordination" (Parent Ex. H).

At the impartial hearing, the student's father testified, that on or about May 25, 2018, he and the student's mother visited the assigned public school site identified in the prior written notice (see Tr. pp. 447-48; Dist. Ex. 4 at p. 1). The student's father also testified that the district school psychologist who attended the March 2018 CSE meeting accompanied them on the visit to the assigned public school site (see Tr. p. 448).

By letter dated May 31, 2018, the student's then-current special education preschool teacher at ADAPT, in conjunction with the school psychologist of the ADAPT school-age program, wrote to advocate for the student's continued attendance at ADAPT for the 2018-19 school year as the "most appropriate placement for her for kindergarten" (see Parent Ex. I at pp. 1-2).[10]

In a letter to the district dated August 29, 2018, the parents' attorney requested the following independent educational evaluations (IEEs) based upon the parents' disagreement with the "most recent evaluations conducted" by district: a neuropsychological evaluation, a speech-language evaluation, an OT evaluation, a PT evaluation, an assistive technology evaluation, a functional

[10] On July 18, 2018, a CPSE convened and developed an IEP, which reflected a projected implementation date of July 18, 2018 and a projected annual review date of July 18, 2019 (see Dist. Ex. 19 at pp. 1-2). At the impartial hearing, the student's father testified that the district school psychologist who had attended the March 2018 CSE meeting also attended the July 2018 meeting (see Tr. p. 420; Dist. Ex. 2 at p. 19). In addition, the student's father testified that an "interpreter" attended the meeting, together with the student's mother and the "several other people" he could not recall, but who were from the school site where the meeting was held (Tr. pp. 420-21). The student's father also identified another individual who attended the July 2018 meeting as the district representative; the student's father testified that he did not know the role of the district school psychologist at that meeting (see Tr. p. 421). He also believed that the student's special education classroom preschool teacher attended the meeting via telephone, but was uncertain (see Tr. pp. 422-23). The student's father described discussions that occurred at the meeting, noting in particular that the district school psychologist "again said that [the student] did not qualify to remain" at ADAPT and that pool therapy was not "considered a full factor" for the student's "well-being" (Tr. pp. 423-24; see Tr. pp. 424-31). Based upon a review of the evidence in the hearing record, it appears that the student's father was mistaken about who attended the July 2018 CPSE meeting, and to some degree, was confused about the purpose of the July 2018 CPSE meeting. For example, the attendance page of the July 2018 CPSE IEP does not indicate that the district school psychologist attended the July 2018 CPSE meeting (compare Tr. p. 420, with Dist. Ex. 19 at pp. 1, 13). Instead, the July 2018 CPSE was composed of the same individuals who conducted the student's July 2017 CPSE meeting—except for the addition of an individual who appeared to be an interpreter, as noted by the student's father (see Tr. pp. 420-21; compare Dist. Ex. 19 at p. 13, with Dist. Ex. 7 at p. 14). The July 2018 CPSE IEP attendance page further reflects that, contrary to the testimony by the student's father, neither he nor "several other people" from the school site attended the July 2018 CPSE meeting (compare Tr. pp. 420-21, with Dist. Ex. 19 at p. 13). Furthermore, according to the July 2018 CPSE IEP, it appears that the CPSE convened to make recommendations for summer 2018, except that the projected implementation date (July 18, 2018) and the projected annual review date (July 18, 2019)—as well as the notations on the cover sheet—confuse this interpretation (see Dist. Ex. 19 at pp. 1-2, 9). A final notice of recommendation dated July 18, 2018, appears to support the conclusion that the July 2018 CPSE IEP was intended solely for the purpose of providing the student with services during summer 2018 (see generally Parent Ex. W).

behavioral assessment (FBA), and a behavioral intervention plan (BIP) (Parent Ex. Y at p. 2). The letter also reflected that the district's "most recent evaluations" were not sufficient (id.).

A. Due Process Complaint Notice

By due process complaint notice dated August 31, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 and 2018-19 school years (see Dist. Ex. 1 at pp. 1-2). More specifically, the parents asserted that the district failed to: "thoroughly and appropriately evaluate" the student on a "timely basis"; "develop a timely, substantively and procedurally valid IEP"; "offer [the student] a timely and appropriate placement and services"; "denied [the student] a FAPE under the IDEA and Section 504"; and violated their "procedural rights under the IDEA and Section 504" (id. at p. 2). More generally, the parents asserted that, in addition to violating the "IDEA," the district "discriminated against [the student] under Section 504 by adopting and implementing blanket policies with respect to the recommendations made on her IEP and the provision of special education services to her" (id.).[11] The parents further alleged that the district violated "42 U.S.C. § 1983 by adopting policies and customs that deprive[d] [the student] of her right to education under [S]tate and federal law" (id.). Next, the parents contended that the district violated their right to "have documents translated into their native language and to have qualified interpreters at meetings," especially with regard to the student's mother who, unlike the student's father, was not proficient in speaking and writing in English (id.).[12] As a result, the student's mother had been "excluded from the special education process" (id.).

Turning back to their concerns about the 2017-18 school year, the parents initially alleged that the district failed to "conduct any evaluations prior to any meeting before developing the 2017 IEP" (Dist. Ex. 1 at p. 3). With regard to the July 2017 CSE meeting, the parents alleged that the district failed to "ensure that it translated documents" for the parents to "review prior to or during the meeting" and "no in-person qualified interpreter" attended the CSE meeting, which resulted in the student's mother having "no access to the documents" discussed and reviewed at the meeting (id. at pp. 3-4). Next, the parents noted descriptions of the student included in the July 2017 IEP, and thereafter, listed approximately 30 "substantive and procedural deficiencies" related to the July 2017 IEP that resulted in the district's failure to offer the student a FAPE (id. at pp. 4-5). Generally, the allegations included, but were not limited to, the July 2017 CSE composition and member qualifications, the sufficiency and adequacy of the evaluative information, parent participation and predetermination, the creation and drafting of the IEP, inaccurate and insufficient present levels of performance, inappropriate or inadequate annual goals, and the failure to recommend particular services (id.). The parents further alleged that the district failed to "ensure that the student's IEP was implemented" for the 2017-18 school year (id. at p. 5).

With respect to the 2018-19 school year, the parents initially indicated that the March 2018 CSE meeting "lasted approximately 30 minutes," the CSE failed to consider "keeping [the student] at her current program" and predetermined the "outcome of the meeting," and the student's then-current special education classroom teacher was "abruptly cut off from participating" at the

[11] As noted in the due process complaint notice, "section 504" refers to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (Dist. Ex. 1 at p. 1).

[12] The parents' native language was Spanish (see Tr. p. 369).

meeting (Dist. Ex. 1 at pp. 5-6). The parents noted that, when they raised the "issue of swimming" as providing benefit to the student and that none of the district's "proposed placements" offered swimming, the parents were repeatedly told that "there was 'no medical formula' indicating that the therapeutic swimming [was] necessary" (id. at p. 6). According to the parents, the March 2018 CSE did not "have any of the reports or documentation at the meeting . . . necessary to defer [the student's] IEP to the Central Based Support Team" (CBST), which was the district's "only mechanism at the [CSE] level for placing" students in nonpublic school program and which would have provided the CSE with the "option of keeping [the student] at ADAPT" (id.). Next, the parents alleged that the district failed to "conduct legally sufficient evaluations" before the CSE meeting and before making the decision to "materially change [the student's] services" (id.). More specifically, the parents alleged that the district failed to assess the student's transportation needs and improperly adhered to a "policy whereby it fail[ed] to advise [p]arents in advance that they ha[d] to obtain their own outside evaluations to request transportation accommodations" and that the CSE could not determine transportation accommodations (id.). According to the parents, the CSE failed to identify or discuss annual goals and only considered a 12:1+(3:1) special class placement (id.). Next, the parents noted descriptions of the student included in the March 2018 IEP, and thereafter, listed approximately 33 "substantive and procedural deficiencies" related to the March 2018 IEP that resulted in the district's failure to offer the student a FAPE (id. at pp. 6-9). The deficiencies alleged regarding the March 2018 IEP substantially included many of the same deficiencies alleged regarding the July 2017 IEP, such as CSE composition and member qualifications, the sufficiency and adequacy of the evaluative information, parent participation and predetermination, the creation and drafting of the IEP, inaccurate and insufficient present levels of performance, inappropriate or inadequate annual goals, and the failure to recommend particular services (compare Dist. Ex. 1 at pp. 4-5, with Dist. Ex. 1 at pp. 6-9). Next, the parents alleged that neither the March 2018 IEP nor "any of the documents relied upon," had been translated into the parents' native language and an interpreter was not present at the CSE meeting to assist the student's mother in accessing the documents reviewed and discussed (Dist. Ex. 1 at p. 9). The parents also alleged that the district failed to conduct "sufficient legally adequate reevaluations after the initial evaluations conducted for transition from the CPSE to the CSE" (id.).

After receiving a "placement letter," the parents noted that they visited "two schools" and participated in a "mediation on or about April 17, 2018" without reaching an agreement (Dist. Ex. 1 at p. 9). According to the due process complaint notice, the parents then visited "three additional [d]istrict 75 schools," and the student's father wrote a letter, dated May 31, 2018, to inform the district of the "problems with each of the three schools he visited, including safety issues and insufficient therapies," namely, the lack of "therapeutic swimming"—which the student was receiving at ADAPT and which the parents believed was "critical" for the student (id.).[13] The parents also alleged that the schools visited lacked "sensory gyms," "padding or mats" to protect students when falling, the schools shared cafeterias with nondisabled students, and the schools lacked a "playground or other type of equipment compatible" with the student's deficits (id.). In

[13] Although the parents indicated in the due process complaint notice that they wrote to the district to advise of their concerns with the assigned public school sites, the only letter dated May 31, 2018 in the hearing record consisted of the letter drafted by the student's then-current special education preschool teacher at ADAPT and the school psychologist of the ADAPT school-age program (see generally Parent Ex. I). The May 31, 2018 letter did not include any concerns about the assigned public school sites visited by the parents (id.). Thus, it appears that the district was first advised of any of the parents' alleged concerns with the assigned public school sites when the parents filed the due process complaint notice in or around August 31, 2018.

addition, the parents indicated that the "placements offered" could not implement the IEP and failed to functionally group students (id.). The parents also indicated that the district's "placement process violate[d] the IDEA as it usurp[ed] the [CSE's] role in selecting programmatic aspects of a program" and "was done without regard to her IEP" (id.). According to the parents, the district also "made decisions about [the student's] special education and general education based upon her disability and classification" (id. at p. 10).

Next, the parents alleged systemic violations and the improper use of "blanket policies" to determine "IEP, placement and services"; violations of section 504, the State Constitution, and the United States Constitution; that the district's "policy and practice" of refusing to respond to "parents' due process complaints" with only "boilerplate form responses" failed to provide parents with "sufficient notice" of the district's positions and thus, interfered with "parents' due process rights"; the district used "blanket policies and the availability of resources" when CSEs made program recommendations; and the district's failure to send individuals who "possess the authority to resolve the type of claims raised [therein]" to resolution sessions (Dist. Ex. 1 at pp. 9-10). As a final point, the parents alleged that the student had not been "appropriately and thoroughly evaluated" or provided with "appropriate services" and "it [was] not possible to identify every potential remedy that m[ight] be warranted to place her in the position she would be in, had she not been subjected to the deprivations described herein" (id. at p. 10).

Turning specifically to the topic of pendency, the parents indicated that the district illegally refused to "implement payments for last-agreed upon/pendency placements and services . . . without an order from an [IHO]" in undisputed pendency placements (District Ex. 1 at p. 10). As a result, parents were "required to retain counsel and incur legal fees" (id.). Anticipating that the district would refuse to implement the student's pendency placement in this case and "insist[ed] upon the issuance of an interlocutory decision from an [IHO]," the parents requested and "immediate pendency hearing" (id. at p. 11). According to the parents, the student's pendency placement was based on the "2017 IEP and placement" consisting of a 12:1+3 special class at ADAPT, three 30-minute sessions of individual speech-language therapy, three 30-minute sessions of individual PT, three 30-minute sessions of individual OT, "therapeutic swimming, and special transportation with a car seat (including all modification[s] that she [was] currently receiving that m[ight] not be specified in [the student's] IEP)" (id.). The parents also requested an order finding that these special education services constituted the student's pendency placement (id.).

In addition to the relief sought under pendency, the parents requested the following relief for the alleged violations: a declaration in their favor finding that the district's "conduct to be illegal as alleged herein"; and a declaratory judgement in their favor finding that the district "violated the laws as alleged herein," failed to offer the student a FAPE for the 2017-18 and 2018-19 school years, "subjected [the student] to blanket policies and predetermination," and the district "discriminated against [the student] based upon her disability" (Dist. Ex. 1 at p. 11). Additionally, the parents requested an order for a "legally valid IEP" that offered the student the "services that constitute[d] [the student's] stay put placement," as well as the following additional services: assistive technology; assistive technology training; mobility training; a 1:1 paraprofessional "in school and on the bus, provided that if the paraprofessional [was] absent, [the student] c[ould] still board the bus and travel to school"; "special education transportation (including all modification[s] that she [was] currently receiving that m[ight] not be specified in [the student's] IEP)"; and "travel and/or wheelchair and mobility devices" (id.). Next, the parents requested compensatory

educational services for the "failure to provide a FAPE or the delay and/or failure to implement pendency" and an order directing the district to "translate into Spanish any evaluations, report cards, progress reports, IEPs and notices from the 2017-2018 and 2018-2019 school years relat[ed] to the 2017 and 2018 IEPs" (id.).

B. Impartial Hearing Officer Decision

On September 21, 2018, the parties proceeded to an impartial hearing, which concluded on October 4, 2019, after 11 total days of proceedings (see Tr. pp. 1-570). In an interim decision on pendency dated September 21, 2018, the IHO ordered the district to provide the following as the student's pendency placement based upon the July 2017 CPSE IEP: a 12:1+3 special class, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, a 1:1 "crisis aide," special transportation (minibus), and to implement the pendency placement at ADAPT (the location of the student's preschool program) (IHO Ex. I at pp. 3-4).[14, 15]

During the impartial hearing, the IHO issued three interlocutory decisions, one of which consolidated the parents' request for independent educational evaluations (IEEs) set forth in a second due process complaint notice, dated March 25, 2019, and another of which declined to consolidate the parents' third due process complaint notice, dated July 1, 2019, raising issues related to the 2019-20 school year (see generally Parent Ex. Y; Apr. 4, 2019 IHO Consol. Order; May 5, 2019 IHO Consol. & Interim Order; Aug. 13, 2019 IHO Consol. Order).[16] The parents obtained the IEEs ordered during the course of the impartial hearing, and the resulting evaluation reports were submitted into the hearing record as evidence (see generally Parent Exs. II-JJ; MM-OO; TT; UU).

Over a year after the impartial hearing concluded, in a final decision dated October 9, 2020, the IHO found that the district offered the student a FAPE with respect to the 2017-18 (July 2017

[14] The IHO's interim decision on pendency is not paginated. For ease of reference in this decision, citations ot the IHO's interim decision on pendency will reflect pages numbered "1" through "6" with the cover page identified as page "1."

[15] Neither the parents nor a representative on their behalf appeared at the first impartial hearing date to establish the student's pendency placement (see Tr. pp. 1-7). According to the transcript, the IHO indicated that he had spoken with the "supervising attorney" for the parents, who had indicated to the IHO that the student could "remain in the preschool program, which [the July 2017 CPSE] IEP was implemented in," to wit, the "ADAPT Community Network Program" (Tr. pp. 4-5). The IHO entered two exhibits into the hearing record as evidence: the parents' due process complaint notice (identified as IHO exhibit I) and the July 2017 CPSE IEP (identified as IHO exhibit II) (see Tr. pp. 2-4). Later, the parties and the IHO re-entered these two exhibits as district exhibit "1" and "7" respectively (compare Tr. pp. 2-4, with Tr. pp. 16, 21-22).

[16] Initially, the IHO declined to consolidate the parents' March 2019 due process complaint notice with the pending matter; however, the parents' attorney later re-presented the IEE issue to the IHO, who agreed to issue a second order consolidating matters (see Tr. pp. 360-65). At that time, the parents' attorney confirmed that they wanted the IEEs to "evaluate the program and placements of the current school year" as well as to "shape the relief" (Tr. pp. 362-63). And although the IHO subsequently declined to consolidate the parents' July 2019 due process complaint notice concerning the 2019-20 school year, the IHO issued an interim order on pendency in that matter, dated August 5, 2019, which was made part of the hearing record in this case and which continued the student's pendency placement at ADAPT (see generally IHO Ex. I).

CPSE IEP) and 2018-19 (March 2018 IEP) school years (see IHO Decision at pp. 5-13, 15).[17] Turning first to the 2017-18 school year, the IHO determined that the district's recommendation for the student to "attend the ADAPT preschool program" provided the student with a FAPE (id. at p. 9). The IHO indicated that, based upon the parents' desire for the student to attend the ADAPT program for the 2018-19 school year, he "must surmise from this that they believe [the student] received an appropriate special education program at ADAPT" in the 2017-18 school year (id.). In addition, the IHO noted that he had "no reason to question the appropriateness of the evaluations conducted by ADAPT or the reports of [the student's] functioning appropriately in the program," and therefore, the IHO concluded that the district—and the CSE—recommended an appropriate preschool program at ADAPT for the 2017-18 school "by following those recommendations" from the reports (id.). In summary, the IHO concluded that the "July 24, 2017 IEP and placement at ADAPT clearly satisfied" the legal standard enunciated in Endrew F. v. Douglas County School District RE-1, 580 U.S. __, 137 S. Ct. 988, 1000 (2017) (id., citing Dist. Exs. 8-11).

With respect to the 2018-19 school year, the IHO noted that "[f]or the reasons described for the 2017/18 school year, [he also found] that the recommendation for the [student] to attend a 12:1:3+1 program" at the assigned public school site (specialized public school) "to be appropriate and afforded" the student a FAPE (IHO Decision at pp. 9-10, citing Dist. Exs. 2-4).[18] More specifically, the IHO found that the 12:1+4 special class placement provided the student with the "assistance of an additional teacher assistant thus increasing the 1:1 assistance that the student require[d] (from the placement at ADAPT)" and that the student required to "address very substantial deficits . . . in all areas of functioning" (id. at p. 10). The IHO also noted that the 12:1+4 special class student-to-teacher ratio exceeded State regulations for "staffing classes for students with severe multiple disabilities" similar to this student (id., citing 8 NYCRR 200.6[h][4][iii]).

Next, the IHO found that the 2018-19 IEP "followed reports" about the student's functioning from the "preschool program at ADAPT," as well as the classroom observation and the information provided by the student's then-current preschool special education teacher (preschool teacher), in identifying the student's needs and in creating the annual goals (IHO Decision at p. 10, citing Dist. Exs. 2; 6; 8-10). According to the IHO, the CSE "continued the

[17] The district added copies of extension requests (identified as "Case Follow-Up Sheets—Extension") granted by the IHO in this proceeding as part of the administrative hearing record (cited as "Admin. Hr'g Ex. 7" based upon district certification) submitted to the Office of State Review pursuant to Part 279 of State Regulations, which reflect that, after the last impartial hearing date held on October 4, 2019, the IHO granted approximately 11 requests to extend the compliance date prior to issuing the final decision on October 9, 2020 (see Admin. Hr'g Ex. 7[a]-[i], [r]-[s]), in addition to 10 other extensions to the compliance date issued during the proceedings held in 2018-2019 (see Admin. Hr'g Ex. 7[j]-[q], [t]-[u]). Its not clear how some of these extensions can be accurate. Upon remand, the IHO should review these extensions with the parties to ensure their accuracy and enter them into the hearing record.

[18] In a footnote, the IHO referenced a subsequently developed IEP—dated July 18, 2018—which had been entered into evidence at the impartial hearing (see IHO Decision at p. 10 fn.2). According to the IHO, the "purpose of that meeting" was unclear, and no "Final Notice of Recommendation (FNR) or Prior Written Notice (PWN) was issued pursuant to the July meeting" (id.). In addition, the IHO indicated that the district defended the March 2018 IEP and the assigned public school site; thus, "[u]nder the circumstances," the IHO concluded that the district was "prepared to implement" the March 2018 IEP at the assigned public school site for the 2018-19 school year (id.). Upon closer inspection, the July 2018 IEP—as noted previously—was created by a CPSE, as opposed to a CSE, and thus, had no bearing on which CSE IEP the district defended, as the hearing record included only one: the March 2018 CSE IEP.

recommendation for a 1:1 para[professional]" from the student's preschool program to assist the student with "ambulation, feeding, and crisis" and, notably, the recommendation for the 1:1 paraprofessional—when combined with the 12:1+4 special class placement—"afforded [the student] with a substantively appropriate IEP" for the 2018-19 school year (id.).

Addressing the parents' "procedural objections to the development" of the IEP for the 2018-19 school year—and in particular, the failure to provide information in the parents' native language—the IHO found that "none of the alleged violations impeded the [student's] right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE or caused a deprivation of educational benefits" (IHO Decision at pp. 10-11). In rejecting the parents' claim that the CSE failed to provide information in the parents' native language, the IHO pointed to the testimony of the "CSE representative" which indicated that she had "translated for the [student's] mother at the CSE meeting, and presumably on the placement visits" (id. at p. 11). In addition, the IHO noted that the student's father demonstrated an "excellent" ability to speak and understand English, "as evidence in his testimony at [the impartial] hearing" (id.). As a final point, the IHO indicated that the IEEs obtained by the parents during the impartial hearing had been conducted in English, and the student's "beginning language [was] English" (id., citing Parent Exs. NN-OO).

Next, the IHO focused on the parents' "principle claim" that the district predetermined the student's placement in a district 75 school and "failed to meaningfully consider retaining [the student] at the ADAPT preschool program" for the 2018-19 school year (IHO Decision at p. 11). In rejecting this argument, the IHO noted that "it [was] plainly not predetermination" when a district did "not maintain a student's placement in a State approved nonpublic school (NPS) when it ha[d] an appropriate public school to place" the student (id.). In support of this statement, the IHO cited to M.B. v. New York City Department of Education, 2017 WL 384352 (S.D.N.Y. Jan. 25, 2017), indicating that the court "rejected a nearly identical claim to that raised in this case" concerning predetermination (id.). According to the IHO, the M.B. court "held that the CSE was not required to defer to the parent's medical personnel and that school psychologist interpretation of the information before the CSE was appropriate" (id.). In addition, the IHO found that the parents failed to point to any legal authority "for the requirement that aquatic pool therapy [was] needed for FAPE," and neither the IDEA nor its implementing regulations requires such (id. at pp. 11-12).

Regarding the parents' claim that the student would "regress without continued placement at ADAPT Preschool," the IHO found that it lacked credibility (IHO Decision at p. 12). More specifically, the IHO found the testimony of the school psychologist who worked at ADAPT to be "self-serving and lacking in credibility" when she explained that the student would experience "regression . . . if placed in a [] [d]istrict 75 setting" (id.).[19] The IHO further noted that the ADAPT school psychologist's work experience in one district 75 school was "of no probative value in determining the appropriateness of the [district] placement in this case" (id.). Moreover, the IHO found, in stark contrast, the district "placement witnesses to be credible," as well as the district

[19] The IHO also briefly explained that the testimony about the student regressing was "inconsistent with reports of the student being described socially/emotionally as beginning to be more socially aware and inconsistently engaging others, smiling at other children in the class, touching other children and allowing them to touch her while accepting other student's attempts to engage her" (IHO Decision at p. 12, citing Parent Ex. G at p. 3).

school psychologist who attended the March 2018 CSE meeting and who also "visited the placements with the parents, to be very credible" (id.).

As to the parents' claim that the district was unable to implement the March 2018 IEP at the assigned public school site, the IHO rejected these arguments (see IHO Decision at pp. 12-13). According to the IHO, the district "placement representative" testified "credibly" at the impartial hearing that the assigned public school site could "successfully" implement the March 2018 IEP (id. at p. 12). Furthermore, the IHO explained that the district school psychologist who attended the March 2018 CSE meeting accompanied the parents to multiple school site visits, and testified that the "school placements . . . could provide all the IEP educationally-based programs" (id. at pp. 12-13). In light of the foregoing, the IHO found that the district "more than satisfied its procedural requirements for parent participation in school placement decisions under the IDEA" and thereafter, concluded that the district offered the student a FAPE for the 2018-19 school year (id. at p. 13).[20]

Next, the IHO noted that the student attended the ADAPT preschool program for the 2018-19 school year pursuant to an interim decision on pendency and district funding of that placement was required pursuant to stay-put (see IHO Decision at p. 13). Additionally, the IHO also noted that the student continued to attend the ADAPT preschool program during the 2019-20 school year as a result of to the parents' July 2019 due process complaint notice related to the 2019-20 school year and an interim decision related thereto (id. at p. 13 fn. 5).

As to the parents' request for additional services—namely, "tutoring, additional related services, and [assistive technology]—needed to provide the student with a FAPE, the IHO found that the March 2018 IEP included related services' recommendations consistent with "levels of related services provided" at the ADAPT preschool program (IHO Decision at p. 13). The IHO also found that the related services recommended for the 2017-18 and 2018-19 school year were appropriate and offered the student a FAPE for both school years (id.). According to the IHO, the student's preschool "evaluations and reports . . . more closely compl[ied] with a FAPE standard of service provision as opposed to reports aimed at maximizing the student's potential expressed by the parents' private evaluators" (id. at pp. 13-14).

The IHO then addressed assistive technology (see IHO Decision at p. 14). Relying on a June 2019 assistive technology evaluation, the IHO found that the student could "benefit" from assistive technology to address her "substantial deficit" in communication (id.). Given that the student demonstrated "her ability to use a communication device," the IHO found that the recommendations within the evaluation report for the use of a speech generating device "in the form of an Adjustable Angle Sequencer and Enabling Devices Compartmentalized Communicator, adapted toys, and 54 hours of training with [a] caretaker," were appropriate (id., citing Parent Ex. OO).

Turning, next, to the issue of parent counseling and training, the IHO found that—unlike students with autism—State regulations did not mandate this service for parents of students "who

[20] In the decision, the IHO also noted that he weighed the testimony by the student's father concerning the visits to the assigned public school site "against the strong desire of the parents to have [the student] remain at the ADAPT Pre-School Program and the very credible testimony" provided by the district school psychologist (IHO Decision at p. 13).

have multiple disabilities" (IHO Decision at pp. 14-15). Nevertheless, the IHO concluded that parent counseling and training services were "essential for [the student] given her substantial deficits" and thus, the IHO ordered the CSE to "reconvene to develop a parent training plan to be included on the student's IEP" (id. at p. 15, citing 8 NYCRR 200.1[kk]).

Finally, the IHO addressed "Other Issues" (IHO Decision at p. 15). Here, the IHO noted that he had "considered all other requests and claims by the parties and f[ou]nd them to be without merit or insufficiently asserted (IHO Decision at p. 15). In support of this conclusion, the IHO pointed to caselaw, which, according to the IHO, held a "claim abandoned where alleged in the complaint but not raised elsewhere in the record" (id.). The IHO also noted, pursuant to federal regulation, that "those issues not raised in the parent's due process complaint notice [were] waived" (id., citing 34 CFR 300.511[d]).

In summary, the IHO did not find that the district failed to offer the student a FAPE, yet ordered the district to provide the student with the recommendations set forth in the assistive technology evaluation, to reconvene a CSE meeting to develop a parent counseling and training plan in the student's IEP, and that in the future the district shall "ensure it provide[d] the parents with notifications in [the parents' native language] to the extent required by law" (IHO Decision at p. 15).

IV. Appeal for State-Level Review

As a result of the IHO's findings that the district offered a FAPE for both school years at issue—yet found that the student's programing had to be modified—both parties unsurprisingly challenge the IHO's illogical decision. The parents initially appeal in a request for review, arguing that the IHO's decision, which found that the district offered the student a FAPE for the 2017-18 and 2018-19 school years, must be reversed on several grounds. Specifically, the parents contend that the IHO—in light of the district's failure to address all the allegations in the due process complaint notice—should have "deemed all factual allegations" in the due process complaint notice and the "credible and unrebutted evidence" as admitted by the district. The parents also contend that the IHO's failure to address all of the procedural and substantive claims in the due process complaint notice warrants findings on appeal that the district failed to sustain its burden of proof and thus, a reversal of the IHO's decision. Next, the parents argue that the IHO misapplied caselaw, precedent, and statutory law, as well as "ignor[ing] virtually every aspect of the substantive and procedural requirements of the applicable statutes." The parents also argue that the IHO erred by failing to hold the district to its burden of proof, and in support of this contention, argue that the district failed to "offer any testimony in support of the evaluations, the 2017 IEP, placement, and procedural due process rights, or any aspect of the procedural provisions of the IDEA relative to the 2018 IEP."

Turning specifically to the 2017-18 school year, the parents allege that the IHO erred in concluding that the district offered the student a FAPE because the district failed to establish that it complied with "any of the IDEA's procedures." In particular, the parents assert that the district failed to establish the following: whether evaluations were conducted "in accordance with the IDEA" and State law; what evaluations, if any, the CSE considered at the meeting; whether the district "provided reports" to the parents prior to the CSE meeting; whether the CSE was properly composed; whether the annual goals in the IEP were sufficient and addressed "all areas of delay"; whether the annual goals were "clear, measurable, sufficiently challenging, contained benchmarks

and were consistent with the student's abilities and [S]tate standards"; whether the BIP "was informed by" an FBA; whether the CSE predetermined the recommendations in the IEP; whether the district deprived the parents of the opportunity to be "involved in the drafting of the IEP and goals"; whether the CSE considered assistive technology for the student; and whether the district provided the parents with prior written notice. According to the parents, the aforementioned procedural violations, either individually or cumulatively, constitute serious procedural violations that "excluded" the parents from the "process" and resulted in a failure to offer the student a FAPE.

As a separate, serious procedural violation related to the 2017-18 school year, the parents argue that the district failed to provide them with "evaluations, notices, safeguards and other documents in their native language," as well as "adequate interpreters at the IEP meeting." The parents contend that this violation excluded them from the process, and the IHO ignored this issue as a basis upon which to conclude that the district failed to offer the student a FAPE.

The parents also allege that, for the 2017-18 school year, the IHO erred in concluding that the district offered the student a FAPE because the district failed to establish that the 2017 IEP was substantively appropriate. Here, the parents assert that the district failed to establish the following, which resulted in a failure to offer the student a FAPE: whether the district's evaluations were "sufficiently comprehensive"; whether the IEP "adequately addressed central areas of delay, including communication, toileting, mobility and feeding"; whether the CSE considered "research-based instruction" and what, if any, consideration was given to "educat[ing] [the student] in the [least restrictive environment (LRE)]"; whether the IEP "contained any 'special education' (other than a class size/ratio)"; whether the district addressed that the student was "legally bilingual"; and whether the CSE considered the student's "access to nonacademic activities such as physical education/swimming." In addition, the parents contend that, contrary to the IHO's finding, their request for pendency to be implemented at ADAPT did not constitute a legal waiver of whether the district offered the student a FAPE.

Regarding the 2018-19 school year, the parents allege that the IHO erred by failing to find that the district's procedural violations rose to the level of a denial of a FAPE. Specifically, the parents assert that the district failed to establish the following: whether the CSE considered "allowing [the student] to remain at her same school, ADAPT"; whether the district conducted any evaluations with respect to the March 2018 IEP, any reevaluations "prior to making an admitted change in placement," and whether the CSE considered the "most recent evaluation" at the CSE meeting, noting that "progress reports from ADAPT . . . constituted evaluations"; whether the district invited the student's "related service providers" to the March 2018 CSE meeting and whether the March 2018 CSE was properly composed; whether the March 2018 IEP "addressed all areas of need"; whether the March 2018 IEP included "sufficient goals concerning all areas of delay" and whether the annual goals were "clear, measurable, sufficiently challenging, contained benchmarks and were consistent with the student's abilities and [S]tate standards"; whether the CSE conducted an FBA or developed a BIP; whether the CSE impermissibly engaged in predetermination of the recommendations and, relatedly, whether the parents were "involved in the drafting of the IEP and goals" and were provided with copies of "reports and documents" prior to the meeting; whether the district provided the parents with prior written notice; and whether the district took '"whatever action [was] necessary to ensure'" that the parents understood the CSE meeting. According to the parents, the aforementioned procedural violations, either individually or cumulatively, constitute serious procedural violations that "excluded" the parents from the "process" and resulted in a failure to offer the student a FAPE.

Similar to the 2017-18 school year allegations, the parents assert as a separate, serious procedural violation related to the 2018-19 school year that the district failed to provide them with "evaluations, notices, safeguards and other documents in their native language," as well as "adequate interpreters at the IEP meeting." The parents contend that this violation excluded them from the process, and the IHO ignored this issue as a basis upon which to conclude that the district failed to offer the student a FAPE.

Next, the parents contend that the IHO should have concluded that the district failed to offer the student a FAPE for the 2018-19 school year because the March 2018 CSE did not consider other placement options, and specifically failed to consider allowing the student to "remain at ADAPT." Relatedly, the parents argue that the March 2018 CSE did not have "any documents" required by the district's own policy for a deferral to the CBST at the CSE meeting. According to the parents, the March 2018 CSE ignored the recommendation for the student to continue at ADAPT, as voiced by the student's then-current special education classroom preschool teacher at the meeting in order to prevent regression. In addition, the parents argue that the March 2018 CSE had no "legitimate reason (or any reason at all)" for changing the student's educational placement from ADAPT to a district specialized school, and the CSE had no "clinical documentation to support a change." The parents also argue that the annual goals in the March 2018 IEP were "grossly deficient," noting more specifically that the "three classroom goals" were "inadequate" in light of the student's "level of need and skill deficits" and that the annual goals were "insufficiently challenging" because the "eight related service goals . . . used the words 'increase' or 'improve' without any indication of starting benchmarks and/or measurable outcomes." Additionally, the parents assert that the IEP failed to address the student's "gross delays in functional skills, like toileting, feeding, and other [activities of daily living (ADLs)]," as well as the student's behavior, and thus, the March 2018 IEP failed to offer the student a FAPE.

As final points, the parents argue that the IHO improperly weighed the evidence and improperly assigned credibility to district witnesses not familiar with the student; the IHO's decision was not supported by the evidence in the hearing record; the IHO erred by discounting the student's need for therapeutic swimming; the assigned public school site was not appropriate ("too far from [the parents'] home, the school did not have the same services and accommodations available at ADAPT (padded room, Rifton chair, appropriate changing area, potty in the classroom) or sensory gym and disabled children were prohibited from using the playground" and the district failed to establish the functional grouping of the proposed classroom or that the assigned public school site could implement the management needs in the March 2018 IEP.

Turning to the issue of relief, the parents assert that the IHO erred in denying the "bank of 1:1 instructional hours, PT, OT, [speech-language therapy], and parent training" as compensatory educational services requested in their closing brief to the IHO, which, according to the parents, was unrebutted by the district. The parents further assert that the IHO erred by denying their request for a vision evaluation and a mobile barium swallow evaluation; failing to order the district to provide the parents with "translated IEPs, progress reports and evaluations" for the school years at issue; and failing to order the district to provide the student a 1:1 travel paraprofessional and a car seat.[21]

[21] The parents also asserted that the IHO erred by failing to address whether the district violated section 504 by attempting to change the student's placement absent a reevaluation, denying her "reasonable accommodations (i.e.

In its answer, the district responds to the parents' allegations and generally argues to uphold the IHO's findings that the district offered the student a FAPE for the 2017-18 and 2018-19 school years. Having offered the student a FAPE for both school years, the district contends that the parents' misguided request for compensatory educational services to "bring the [s]tudent's performance up to her age level" must be denied. In addition, the district argues that, contrary to the parents' allegation, the district "introduced evidence and defended its offer of FAPE," and therefore, the IHO was not required to deem "all factual allegations as unrebutted." Relatedly, the district asserts that the IHO properly held the district to its burden of proof, and the district was not required to provide testimonial support for the documentary evidence. The district further contends that, contrary to the parents' assertion, the IHO "explicitly stated that he considered all other requests and claims" and found them to be "without merit or insufficiently asserted, or abandoned"—and as a result, the parents improperly argue that the IHO failed to address or rule on all of the issues and claims raised in the due process complaint notice.

Next, the district asserts that the parents' alleged procedural violations do not warrant a sufficient basis upon which to overturn the IHO's decision or to conclude that the district failed to offer the student a FAPE. Specifically, the district argues that the parents' challenges to the CSE process—namely, that the district failed to conduct its own evaluations and failed to consider and follow recommendations within the evaluative material—is without evidentiary support. Rather, the district contends that the evidence reflects that, consistent with the IDEA and applicable State regulations, the CSE "reviewed the progress reports" to ascertain the student's performance levels, a classroom observation, and that this information provided the CSE with "appropriate information" to develop the student's IEP. With respect to the parents' assertion that the district

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remaining in a school close to her home)," committing "multiple violations of the IDEA, and by developing the student's IEP and "making decisions about her program and placement" based on "policies and practices of general applicability." With regard to the parents' contentions that the IHO failed to address the section 504 claims raised, an SRO lacks jurisdiction to consider a parent's challenge to an IHO's failure or refusal to rule on section 504, section 1983, or claims with respect to alleged systemic violations, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (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"]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. Sch. Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]). Likewise, as compensatory damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, even if the IHO had addressed these claims, an SRO would have no jurisdiction to review any portion of a parents' claims regarding section 504, section 1983, or systemic violations or policy claims, and to the extent such claims are asserted in this proceeding on appeal, such claims will not be further addressed. I note only that federal regulations provide that a district may use the IDEA hearing procedures for conducting a hearing pursuant to Section 504 (34 CFR 104.36), and that in this case it's not clear to me whether the IHO was even appointed by the district as a hearing officer pursuant to section 504 for purposes of conducting a hearing under both statutes under that permissive regulation. How the burden of proof is supposed to work in an administrative hearing conducted in New York State under both statutes has never been addressed to my knowledge.

failed to conduct an assistive technology evaluation and a vision evaluation of the student, the district argues that the evidence supports the CSE's decision not to conduct the assistive technology evaluation—because a speech-language therapist did not recommend one—and the hearing record lacks evidence that the student needed a vision evaluation, or vision services, to benefit from the recommended program. The district similarly argues that the evidence supports the CSE's decision not to conduct an FBA because the CSE had "sufficient information for the [BIP] and the recommendation for the paraprofessional."

Next, the district addresses the parents' contention that the failure to provide translated IEP documents and an interpreter at CSE meetings deprived them of the opportunity to participate in the development of the student's IEP. On this point, the district argues that, while acknowledging that the parents are bilingual, the evidence reveals that the district school psychologist translated for them at the CSE meeting, when needed, and the parents engaged in discussions at the meeting by voicing their agreement with recommendations and by expressing their desire for the student to have access to pool or aquatic therapy. In addition, the district asserts that the district school psychologist accompanied the parents on visits to three proposed assigned public school sites. The district acknowledges that it committed a procedural violation by failing to provide the parents with prior written notice translated into their native language, however the district contends that such violation did not rise to the level of a failure to offer the student a FAPE. The district further argues that the parents' disagreement with the CSE's decision not to include pool or aquatic therapy in the student's IEP does not equate to a failure to participate, nor does the CSE's decision to recommend a public school as opposed to allowing the student to remain at ADAPT for the 2018-19 school year. Similarly, the district argues that the CSE did not impermissibly predetermine the student's program by declining to consider ADAPT, since the district could properly address the student's needs in a public school and thus, was not required to consider a State-approved nonpublic school program.

Finally, the district contends that, contrary to the parents' assertion, the cumulative effect of the procedural violations do not result in a failure to offer the student a FAPE, as the evidence in the hearing record establishes such violations as either unfounded or "insubstantial" (i.e. do not result in a substantive denial of a FAPE).

As and for a cross-appeal, the district asserts that the IHO erred in awarding assistive technology because the IHO had determined that the district offered the student a FAPE for both the 2017-18 and 2018-19 school years. As relief, the district seeks to overturn the IHO's award of relief of assistive technology.[22]

[22] In addition to awarding assistive technology services, the IHO also directed the district to develop a parent counseling and training plan to be included in the student's IEP and to provide the parents with notifications in their native language, to the extent required by law. Since neither the district—as the party aggrieved by the relief awarded by the IHO—nor the parents have appealed these portions of the relief awarded by the IHO, those aspects of his decision have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). As a reminder to the parties—and contrary to the IHO's rationale in the decision—State regulation mandates that "[f]or parents of students placed in special classes described in subparagraphs (4)(ii) and (iii) of this subdivision, provision shall be made for parent counseling and training as defined in section 200.1(kk) . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.6[h][4][ii]-[iii]; [8]).

In an answer to the district's cross-appeal, the parents argue that regardless of whether the district offered the student a FAPE the IHO retained authority to order compliance with the procedural requirements of the IDEA and to award assistive technology services under the IHO's broad equitable authority to grant relief. In addition, the parents contend that the IDEA required the district to provide the student with assistive technology services "separate and apart" from its obligation to offer a FAPE. Next, the parents argue that the district failed to challenge their request for assistive technology services and thus, waived the right to challenge such request. Finally, the parents allege the district's answer and cross-appeal fail to comply with practice regulations.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 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]).[23]

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. 2017-18 School Year

As one argument to overturn the IHO's finding that the district offered the student a FAPE for the 2017-18 school year, the parents point to the district's failure—as well as the IHO's failure—to address all of the issues raised in the due process complaint notice. With respect to the district,

[23] 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).

the parents contend that the IHO should have deemed "all factual allegations" as admitted by the district.[24] The parents argue that, because the IHO was required to address all of the issues or claims raised in the due process complaint notice, the SRO should find that the district failed to sustain its burden of proof, and conclude that the district failed to offer the student a FAPE. In response, the district argues that it presented evidence and "defended FAPE" at the impartial hearing, and the IHO addressed all of the parents' issues and claims by "explicitly stat[ing] that he considered all other requests and claims" and found them to be "without merit or insufficiently asserted, or abandoned."[25]

Initially, it is undisputed that the parents' due process complaint notice included numerous allegations related to the 2017-18 school year (see Dist. Ex. 1 at pp. 1-5). For example, as noted previously, the parents—in list form—alleged approximately 30 procedural and substantive violations concerning the July 2017 CPSE IEP, which, according to the parents, resulted in a failure to offer the student a FAPE for the 2017-18 school year (id. at pp. 4-5). Thereafter, in the closing brief submitted to the IHO, the parents—albeit in a footnote—set forth the following:

> Any issues pled in the [due process complaint] but not expressly raised here are incorporated by reference herein and not abandoned, even if they are not expressly referenced in this closing memorandum. To the extent an allegation was made and the [district] has not met its burden to rebut the allegation, the IHO should deem the allegation true**.**

(IHO Ex. III at p. 2 n.2).

In addressing the 2017-18 school year in the decision, the IHO did not identify any of the issues raised in the due process complaint notice or conduct any legal analyses of the alleged procedural or substantive violations (compare IHO Decision at p. 9, with Dist. Ex. 1 at pp. 4-5).

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[24] In support of this argument, the parents cite to two administrative decisions: Application of a Student with a Disability, Appeal No. 14-179 and Application of a Child with a Disability, Appeal No. 01-044. In a footnote in Application of a Student with a Disability, Appeal No. 14-179, the SRO noted that the district conceded that it failed to offer the student a FAPE and the hearing record lacked any indication of the IEP's deficiencies; as such, the SRO—under the circumstances of that appeal—"presume[d] that the district intended to admit every deficiency alleged by the parent in the due process complaint notice" pertaining to the challenged IEP in the "absence of any clarification of the scope of its concession and for purposes of fashioning relief related to the denial of a FAPE" (Application of a Student with a Disability, Appeal No. 14-179 [emphasis added]). The district in this case did not concede that it failed to offer the student a FAPE for either school year; therefore, the parents' reliance on this administrative decision in support of their argument is misplaced. The parents' reliance on Application of a Child with a Disability, Appeal No. 01-044 is similarly flawed. In that decision, the district did not submit an answer to the petition, and based upon State regulation existing at that time, such failure resulted in deeming the statements in the petition to be "true statements" (Application of a Child with a Disability, Appeal No. 01-044). Here, the district submitted an answer; therefore, this administrative decision does not support their argument. Consequently, the parents' argument must be dismissed and will not be further addressed in this decision.

[25] To be clear, it is difficult to discern from the district's answer which school year it refers to when stating that it "defended FAPE" (Answer ¶ 12). On the second impartial hearing date, statements by the district's attorney indicated uncertainty with respect to whether the district would be defending the 2017-18 school year (see Tr. pp. 8, 10). However, during her opening statement, the district's attorney appeared to clarify the earlier uncertainty by affirmatively asserting that the district offered the student a FAPE for both school years (see Tr. pp. 24-28).

Instead, the IHO found in a conclusory manner that the district offered the student a FAPE because the CPSE followed the recommendations in the ADAPT progress reports and/or evaluations that described the student's functioning, and thus, the CPSE "recommended an appropriate preschool program" for the 2017-18 school year (IHO Decision at p. 9). As evidentiary support, the IHO cited to several district exhibits—8, 9, 10, and 11—because in this instance, the district elected not to present any testimonial evidence concerning the allegations related to the 2017-18 school year (id.; compare Tr. pp. 1-570, with Dist. Ex. 1 at pp. 1-5).

Ideally, if a district intends to rest its case on documentary evidence alone, the district should offer into evidence all documentation pertaining to the evaluation of the student and the CSE's recommendations, including prior written notices (34 CFR 300.503[a]; 8 NYCRR 200.5[a]; see also L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]). In the present case, although the district exhibits the IHO appeared to rely upon to reach his conclusion about the 2017-18 school year predated the July 2017 CPSE meeting, the hearing record contains no evidence upon which to conclude that the CPSE actually relied upon these particular documents to develop the student's July 2017 IEP, aside from the presumption that the CPSE relied on documents predating the meeting (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III). In addition, the hearing record did not include a prior written notice concerning the July 2017 CPSE meeting that would have, consistent with State regulation, documented the evaluative information relied upon by the July 2017 CPSE (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III).[26] In light of these facts and circumstances, the IHO's finding that the July 2017 CPSE relied upon particular documents to develop the IEP—and followed the recommendations therein—is unsound and runs afoul of the Second Circuit's holding in L.O., which expressly held that "the existence of evaluative materials at the time of the relevant CSE meeting that corroborated the terms of the IEP misses the point," because that would provide too much discretion to the reviewing official(s) (L.O., 822 F.3d at 110).[27]

Additionally, the IHO indicated—under "Other Issues"—that he had "considered all other requests and claims by the parties and f[oun]d them to be without merit or insufficiently asserted" and consequently, were abandoned (id. at p. 15, citing T.B. v. Haverstraw-Stony Point Cent. Sch.

[26] Among the procedural requirements in State and federal regulations is the requirement 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 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]).

[27] These types of disputes highlight the tension between reviewing the entire hearing record as required by the IDEA including the evaluations of a student and thereafter doing something that makes sense, educationally speaking for the disabled student in light of the evaluative material, and ensuring that a parent's participatory rights in the CSE are sufficiently honored as required by the IDEA.

Dist., 933 F. Supp. 2d 554, 566 n.6 [S.D.N.Y. 2013] [internal citations omitted]). The IHO also noted that "those issues not raised in the parent[s'] due process complaint notice [were] waived" (id. at p. 15, citing 34 CFR 300.511[d]).[28]

The IHO did not, however, identify what issues had been abandoned pursuant to Haverstraw-Stony Point or which issues the parents had waived because they were not included in the due process complaint notice (see generally IHO Decision). Furthermore, the IHO's reliance on Haverstraw-Stony Point—and to the internal citation to Singleton v. City of Newburgh, 1 F. Supp. 2d 306, 312 (S.D.N.Y. 1998)—to find that any issues and/or claims were "abandoned where alleged in the complaint but not raised elsewhere in the record" is misplaced (IHO Decision at p. 15). In both of those cases, claims were deemed abandoned when the party bearing the burden of proof in a motion for summary judgment proceeding at the district court level did not continue to press certain issues before the court that had been previously raised (Haverstraw-Stony Point, 933 F. Supp. 2d at 566 n.6; Singleton, 1 F. Supp. 2d at 312). Having raised issues in the due process complaint notice, the IHO failed to explain what else the parents were required to do at the impartial hearing to prevent abandonment of properly raised claims (see generally IHO Decision). The IHO also failed to explain how the parents—as the party who, under State statute, does not bear the burden of proof with regard to whether the district offered the student a FAPE based upon the issues raised in their due process complaint notice, could abandon such issues or claims by not further raising those same issues at the impartial hearing (see Educ. Law § 4404[1][c]; see generally IHO Decision). Moreover, the IHO did not conduct a prehearing conference to clarify issues—or to otherwise provide the parents with the opportunity to affirmatively abandon or withdraw certain issues prior to the presentation of proof—and the IHO failed to acknowledge or consider the plain language in the parents' closing brief specifically stating their intention to not waive or abandon any issues or claims raised in the due process complaint notice (see generally IHO Decision). In New York in particular, in which the party seeking relief is not the party bearing the burden of production, one of most important tools that an IHO has to effectively manage a due process hearing is the prehearing conference during which disputed issues of fact that must be resolved can be clarified by the IHO and the parties, and then the IHO can set expectations regarding the type of evidence he or she will need in order to effectively resolve those issues.[29]

In light of the foregoing, the IHO's finding that the district offered the student a FAPE for the 2017-18 school year is vacated.

[28] The federal regulation relied upon by the IHO refers to the subject matter of the impartial hearing (see 34 CFR 300.511[d]). The regulation mandates that the "party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint . . ., unless the other party agrees otherwise" (34 CFR 300.511[d]). In other words, the parents—as the party requesting the impartial hearing—may not raise issues at the impartial hearing that were not already raised in the due process complaint notice unless the district agreed, and thus, expand the scope of the impartial hearing.

[29] More typically in cases that I have reviewed, the three or four "issues" that are identified in a prehearing conference are something along the lines of "whether the student was offered a FAPE," "whether the unilateral placement was appropriate for the student," (if it is a tuition reimbursement case), and "whether equitable considerations support the parent's request for relief." These global questions of law, which are legal as much as factual, are insufficiently specific for a prehearing conference – they are present in virtually every due process hearing conducted under the IDEA and are too broad to effectively manage a hearing.

Turning back to the parents' appeal, they continue to press the procedural and substantive violations raised in the due process complaint notice, but which the IHO failed to address, as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2017-18 school year (see Req. for Rev. ¶¶ 2-9). When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, the IHO should have made determinations regarding the remaining issues in the first instance. In the event of an administrative or judicial review, in which the reviewing body might disagree with a singular finding, it is important to have the remaining issues and the rationales addressed, even briefly (cf. F.B., 923 F. Supp. 2d at 589). Also, such an analysis serves as a guide to the district as to whether it should undertake corrective action in the future in order to comply with the IDEA.[30]

In this instance, while loathe to remand the matter for further administrative proceedings for an IEP and a school year long-since expired, the IHO's failure to address the multitude of issues raised regarding the July 2017 CPSE process and the IEP itself, which the parents continue to assert on appeal, together with the vacatur of his other findings warrant remanding the matter. It is left to the sound discretion of the IHO on remand to determine whether additional evidence is required in order to make the necessary findings of fact and of law relative to the parents' claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Additionally, given the extensive list of issues identified in the due process complaint notice concerning the 2017-18 school year, it is strongly suggested that the IHO schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).

If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims contested on appeal will be addressed at that time (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).

[30] The parents' argument that the IHO should have "deemed all factual allegations in the DPC, as well as credible and unrebutted evidence to be admitted by the [district]" is another way of asserting that the IHO should have issued a default judgment against the district, which can only be plausibly grounded in the State's statute governing the burden of proof in IDEA due process hearings (Educ. Law § 4404[1][c]). However, the federal statute requires that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education" which leaves the IHO in a terrible predicament when asked to make a default judgement, an option strongly disfavored by the federal courts (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005]; see also G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]). Other than the courts, which have their own procedural mechanisms that are different that those in the IDEA's due process procedures, there is no specific law or guidance to rely on to resolve these problems in the due process system.

B. 2018-19 School Year—March 2018 CSE Process[31]

1. March 2018 CSE Composition

The parents assert that the district failed to establish whether the March 2018 CSE was "legally constituted" and whether the district invited the student's related services providers to the March 2018 CSE meeting (Req. for Rev. ¶ 10).[32, 33]

The IDEA requires a CSE to include the following members: the parents; one regular education teacher of the student (if the student was, or may be, participating in the regular education environment); one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a district representative; an individual

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[31] In the request for review, the parents argue that the IHO erred by failing to find that the district's procedural violations alleged in the due process complaint notice resulted in a denial of a FAPE for the 2018-19 school year (see Req. for Rev. ¶ 10). Thereafter, the parents identified the procedural violations, in part, by listing several paragraph numbers from the due process complaint notice (id. [identifying paragraphs "42-44, 45, 49, 54(a), (c)-(e), (p)-(w), (bb), 55-57, 64, [and] 77"]). The parents also included a list of alleged procedural violations ([a]-[r]) by actually stating what the district failed to establish as an alleged violation, i.e. "the [district] considered allowing [the student] to remain at her same school, ADAPT" (id.). Because it is not an SRO's role to research and construct a party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [noting that appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [finding that a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [concluding that a generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [explaining that the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]), I will not now do so for the parents with respect to the procedural violations identified solely by paragraph number. State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (id.). Additionally, State regulation requires that a request for review shall set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). I will, however, address those issues that are properly raised on appeal and are clearly identified in the request for review, with more fully developed arguments in the memorandum of law submitted by the parents pertaining to the 2018-19 school year.

[32] The parents did not include any additional arguments regarding the March 2018 CSE composition in either the request for review or the memorandum of law submitted in support of the request for review (see Req. for Rev. ¶¶ 10-20; Parent Mem. of Law pp. 5-15).

[33] In the due process complaint notice, the parents alleged the following with regard to the composition of the March 2018 CSE: the "IEP 'team' was not properly constituted; upon information and belief, the team did not have the required members, and if those individuals were present in name/title, they did not possess the required knowledge, training, or independence to properly formulate a legal IEP" (Dist. Ex. 1 at p. 8). The parents did not otherwise describe or elaborate upon these allegations in due process complaint notice for the 2018-19 school year (id. at pp. 5-9). In the closing brief submitted to the IHO, the parents alleged, in one sentence, that the March 2018 CSE was not properly composed because it failed to include "any related services providers" even though the student received OT, PT, and speech-language therapy (IHO Ex. III at p. 21).

capable of interpreting instructional implications of evaluation results; at the discretion of the parent or district, other persons having knowledge or special expertise regarding the student; and if appropriate, the student (see 20 U.S.C. § 1414[d][1][B]; see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

At the impartial hearing, the parents' attorney initiated the questioning about the composition of the March 2018 CSE during the cross-examination of the district school psychologist (see Tr. p. 57; compare Tr. pp. 31-47, with Tr. pp. 47-121, 131-69). The district school psychologist confirmed that the attendance page of the March 2018 IEP accurately reflected the CSE attendees: the student's then-current special education preschool teacher at ADAPT, both parents, the district school psychologist (who also served as the district representative), and a district social worker (see Tr. pp. 35, 56-57, 176; Dist. Ex. 2 at p. 19).[34] Upon further cross-examination of the district school psychologist, the parents' attorney explored the recommendations made during the March 2018 CSE, and confirmed with this witness that the CSE did not include a physical therapist, an occupational therapist, or a speech-language provider (see Tr. pp. 80-82).

Consistent with the IDEA and regulations cited above, the evidence in the hearing record supports a finding that the March 2018 CSE was properly composed. Here, the March 2018 CSE consisted of both parents, the students' preschool teacher at ADAPT (as a special education teacher of the student), the district school psychologist—dually serving as district representative and as an individual capable of interpreting instructional implications of evaluation results, and a district social worker (although not required) (see Tr. pp. 56-57; Dist. Ex. 2 at p. 19). With respect to their final contention, the parents do not point to any legal authority in support of the assertion that, because the student received OT, PT, and speech-language therapy, the March 2018 CSE was not properly composed because the district did not establish whether the student's related services providers had been invited to the meeting. Assuming for the sake of argument that the parents' contention merited a conclusion that the district committed a procedural violation by failing to invite the student's related services providers, the parents do not articulate how that procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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) and resulted in a failure to offer the student a FAPE for the 2018-19 school year.

[34] In their closing brief submitted to the IHO, the parents argued that the March 2018 CSE was not properly composed primarily because the district school psychologist was not properly qualified to serve as the district representative (see IHO Ex. III at p. 21). The IDEA and federal and State regulations require that a CSE include "a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district" (8 NYCRR 200.3[a][1][v]; see 20 U.S.C. § 1414[d][1][B][iv]; 34 CFR 300.321[a][4]). However, on appeal, it appears that the parents have abandoned this particular argument, given that it is no longer argued in either the request for review or the memorandum of law submitted in support of the request for review (see generally Req. for Rev.; Parent Mem. of Law).

2. Parent Participation

With respect to parent participation at the March 2018 CSE meeting, the parents' arguments focus on whether the district's failure to provide documents translated into their native language and interpreters at the CSE meeting excluded the student's mother from the IEP development process and constituted a failure to offer the student a FAPE as a "serious procedural violation."[35, 36] The parents also generally allege that they were not involved in the drafting of the IEP and the annual goals.

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[35] To be clear, the parents argument in the memorandum of law focused on whether the district's inadequate translation and interpretation services deprived the student's mother of the opportunity to participate at the CSE meeting (and/or CPSE meeting), but raised no similar concerns related to the student's father (see Parent Mem. of Law at pp. 9-11 [emphasis added]). The parents also allege more specifically in the request for review that the district failed to sustain its burden to establish whether they were involved in the drafting process of the annual goals (see Req. for Rev. ¶10). However, in the accompanying memorandum of law, the parents do not argue this point in support of their parent participation claim (argued under the "Translation/Interpretation" heading) (see Parent Mem. of Law at pp. 9-11). Instead, the parents argue in the memorandum of law that the annual goals in the March 2018 IEP were not appropriate, in part, because the March 2018 CSE did not discuss the annual goals in the parents' native language at the meeting (id. at pp. 13-14).

[36] To the extent that the parents also argue in the request for review that the March 2018 CSE failed to provide them with copies of "reports and documents" prior to the meeting "so that they could be prepared" and that the district failed to provide them with a prior written notice related to the March 2018 CSE meeting, the parents did not raise these in the due process complaint notice as issues to be resolved related to the 2018-19 school year (compare Req. for Rev. ¶ 10, with Dist. Ex. 1 at pp. 5-9). Instead, the parents' admitted in the due process complaint notice that they "received prior written notice in English, dated March 16, 2018" after the March 2018 CSE meeting and that the district failed to provide them with copies of translated documents relied upon and reviewed by the March 2018 CSE, as well as the IEP (Dist. Ex. 1 at pp. 7, 9; see generally Dist. Ex. 3). Upon review, it appears that the parents first alleged that the district failed to provide them with "any materials or documents before the IEP meeting" in the closing brief submitted to the IHO (compare IHO Ex. III at p. 20, with Dist. Ex. 1 at pp. 5-9). The parents' proffered this argument in support of finding that the CSE deprived them of the opportunity to participate at the CSE meeting; however, the testimony by the student's father cited as evidence of this alleged violation referred to their participation at a July 2018 CPSE meeting, not the March 2018 CSE meeting (see IHO Ex. III at p. 20, citing Tr. p. 423). The parents also cited to testimony elicited from the district school psychologist during cross-examination by the parents' attorney (see IHO Ex. III at p. 20; Tr. p. 140). While the specific testimony cited by the district school psychologist reflects that she, herself, did not send the parents any documents listed in the March 2018 prior written notice before the March 2018 CSE meeting—and that she did not know whether those same documents had been translated into the parents' native language—she also testified that she was not the only individual who could possibly be responsible for sending documents to parents before a CSE meeting (compare Tr. p. 140, with Tr. pp. 133-37). The district school psychologist clarified that documents were "usually [sent] with the notice of IEP meeting," but without having access to the district's "SESIS" records at that time—which would reflect this "event"—she could not confirm whether documents had been provided to the parents before the March 2018 CSE meeting (Tr. pp. 136-37). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or add these issues to the amended due process complaint notice filed in this matter (dated March 2019; see Consolidation order). Nor can it be said that the district "opened the door" to these claims by raising evidence as a defense to a claim that was not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Therefore, I will not review these issues raised for the first time on appeal.

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]).

In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of a Student with a Disability, Appeal No. 13-136).[37] With respect to the translation of documents, both federal and State regulations require that a district provide parents with certain documents in their native language—including the "results of the evaluations" ("unless it is clearly not feasible to do so")—ensure that consent and procedural notices are provided in the parents' native language, and provide a translator at all times during the impartial hearing process (see, e.g., 20 U.S.C. § 1415[b][4], [d][2]; 34 CFR 300.9[a]; 300.503[c], 300.504[d]; 8 NYCRR 154-1.3[b], 200.1[*l*][1], 200.4[a][9][ii], [b][6][xii], [g][2][ii], 200.5[a][4], [f][2]). Neither the IDEA nor federal or State regulations require that a

[37] Although the IDEA defines "native language" for an individual of limited English proficiency who is not a student as "the language normally used by that individual" (20 U.S.C. § 1401[20]; 34 CFR 300.29[a]; 8 NYCRR 200.1[ff][1]), the pertinent laws and regulations defining "limited English proficiency" only apply to students (see 20 U.S.C. § 9101[25]; 34 CFR 300.27; 8 NYCRR 200.1[iii]). In addition, the United States Department of Education's Office of Civil Rights has issued guidance indicating that a parent with limited English proficiency is one "whose primary language is other than English and who ha[s] limited English proficiency in one of the four domains of language proficiency (speaking, listening, reading, or writing)" (Dear Colleague Letter: English Learner Students and Limited English Proficient Parents at p. 37 (OCR 2015).

district provide parents with a copy of the IEP in their native language (Letter to Boswell, 49 IDELR 196 [OSEP 2007] [noting that while "[t]here is no requirement in IDEA or in its accompanying regulations that all IEP documents must be translated," districts are required to provide parents with full information, in their native language, of all information relevant to activities for which consent is sought]; see 34 CFR 300.9[a], 300.320; 8 NYCRR 200.1[*l*][1], 200.4[d][2]).[38]

In this context, a finding that the student did not receive a FAPE for the 2018-19 school year could only be found if procedural inadequacies involving the failure to provide an interpreter at the March 2018 CSE meeting—and the failure to provide the parents with documents translated into their native language—significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Based upon a review of the evidence in the hearing record, it is undisputed that the district did not provide an interpreter at the March 2018 CSE meeting and, moreover, the hearing record is devoid of evidence that the district translated any of the documents relied upon by the CSE into the parents' native language because the hearing record fails, in part, to contain any documents translated into Spanish (see Tr. p. 414; see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III). It is also undisputed that the student's father was bilingual (able to speak English and Spanish), and both parents attended the March 2018 CSE meeting (see Tr. pp. 369; Dist. Ex. 2 at p. 19). In addition, the evidence in the hearing record indicates that the district school psychologist took "minutes" during the CSE meeting and had "all of the documentation" and discussed "all of that information," but the CSE did not have the "IEP in front of [them]" (Tr. pp. 166-67). With respect to the annual goals in the March 2018 IEP, she testified that the "progress reports from the teacher, from the [OT], PT, and speech had goals in them" and the annual goals were discussed with the parents (Tr. pp. 163, 165-66; see Tr. pp. 112-14). She could not recall whether the annual goals were discussed with the parents in Spanish (see Tr. p. 114). The district school psychologist testified that the parents would have seen the IEP for the first time after it had been "finalized" and sent to them with the prior written notice (Tr. p. 167). Here, the March 2018 CSE met on March 6, 2018 (see Dist. Ex. 2 at p. 15), the prior written notice was dated March 16, 2018 (see Dist. Ex. 3 at p. 1), and the parents admitted in the due process complaint notice that they received the March 2018 IEP "two to three weeks after the meeting" (Dist. Ex. 1 at p. 6).

At the impartial hearing, the district school psychologist who attended the March 2018 CSE meeting testified that she had a bilingual certification in Spanish (see Tr. pp. 32, 48). She also testified that, at the March 2018 CSE meeting, she alternately spoke in English or Spanish "depending on the information" that either the student's mother or father required to be translated (Tr. p. 43). When asked more specifically about what she said in Spanish at the CSE meeting, the district school psychologist recalled that she asked the student's mother if she had any questions throughout the meeting and translated information provided by the district social worker, who also spoke Spanish (Tr. pp. 92-93). The district school psychologist also testified that she informed the

[38] Although not required to provide parents with a copy of an IEP in their native language, doing so would be in keeping with the spirit of the IDEA and is one way to demonstrate that the parent has been "fully informed of their child's educational program" (Letter to Boswell, 49 IDELR 196 [OSEP 2007]).

student's mother that she would continue to translate during the meeting "whenever [the student's mother] needed" or whenever she felt it was otherwise needed (Tr. pp. 92-93).

The district school psychologist also testified that as part of the "Turning-5" process, she would use a translator or interpreter if she did not "speak the language" (Tr. p. 141). With respect to this student, the district school psychologist testified that she considered the parents to be bilingual, and therefore, she also considered the student to be bilingual as well (see Tr. p. 142). In addition, the district school psychologist was aware that the student's mother only spoke Spanish at home and that whenever she communicated with the student's mother, they spoke in Spanish (see Tr. p. 142; see also Tr. p. 369).[39] She also testified that the student's father was bilingual and would often communicate in either English or Spanish (see Tr. p. 142).[40] When asked if the March 2018 CSE meeting had been conducted in Spanish, the district school psychologist testified that she translated for the student's mother when she needed "further explanation or translation" (Tr. p. 143). Although she could not quantify "how often" she translated at the meeting, the district school psychologist confirmed that it was "based on the parents['] needs" and "as many times as [the student's mother] needed to be given the translation" (Tr. p. 143).

According to the "Parent Concerns" noted in the March 2018 IEP, "due process was explained at length to [the student's] mother" (Dist. Ex. 2 at p. 17). In addition, the IEP reflected that the student's mother was "given the opportunity to ask questions and discuss issues and concerns" (id.). In particular, the IEP documented that the parents wanted the student to "continue in [the] current school," as well as their concern that the student "will not receive pool therapy" (id.).

The student's father testified at the impartial hearing, and he indicated that the student's mother spoke English "a little bit" and could also read in English "a little bit" (Tr. pp. 369-70).[41] He also testified that the student's mother "understood it" (Tr. p. 370). According to his testimony,

[39] In contrast, the student's father testified that, at the time of the July 2017 CPSE meeting, he did not think the "school" was aware that the student's mother spoke Spanish or that her native language was Spanish (Tr. pp. 400-02). He also testified that the student's then-current special education preschool teacher—who attended the July 2017 CPSE meeting—was aware that the student's mother spoke Spanish (see Tr. pp. 401-02). According to the student's father, the July 2017 CPSE did not include an interpreter, and he did not ask for one because he was not aware that he could do so (see Tr. pp. 401-02). When asked if he was able to "interpret during this meeting," the student's father testified that he "couldn't have been able to focus on interpretation and listening to the discussion"—so his "translation at that time was only minimal to [the student's mother] when she asked [him]" (Tr. p. 402). In contrast to the questioning about the July 2017 CPSE meeting, the student's father was not asked whether he interpreted for the student's mother at the March 2018 CSE meeting or whether he had been provided with any documents—in either English or Spanish—at the March 2018 CSE meeting (see Tr. pp. 411-20).

[40] At the impartial hearing, the student's father testified that at home he spoke in both English and Spanish to the student (see Tr. p. 369).

[41] When the parents' attorney presented the student's father as a witness, the IHO inquired about whether there was "any need for any language assistance at all" (Tr. p. 367). According to the parents' attorney, she had "advised [her] client," and the student's father had "asked to attempt to proceed in English" and "[t]hat would be easier for him" (Tr. p. 367). However, the parents' attorney had also told him that if he did not understand something that he could ask them to slow down or "ask [the IHO] for permission to use the interpreter," which the IHO granted (Tr. p. 367). The student's father testified in English and without the assistance of the interpreter (see Tr. pp. 367-455).

the student's mother had taken English as a second language for two semesters at a "community school," but was not fluent (Tr. p. 370). When reading a newspaper or book, the student's mother read in Spanish (see Tr. p. 370). With respect to the March 2018 CSE meeting, the student's father testified that he was aware that the district school psychologist spoke Spanish, but recalled that the meeting had been conducted "basically in English" and did not recall any Spanish spoken at the meeting (Tr. p. 414). He also testified that he did not ask for an interpreter at the CSE meeting because he was not aware he could do so (see Tr. p. 415).

According to the student's father, the March 2018 CSE discussed the student's behaviors, her communication, "feeding," "speech," and the "pool" (Tr. p. 415). He recalled asking the March 2018 CSE about the "pool" because it was "important" for the student and it helped "her to benefit with her body motion" (Tr. p. 415). The student's father also testified that the student's preschool teacher also discussed "how the pool impact[ed] [the student's] education" at the March 2018 CSE meeting (Tr. p. 416).[42] He also noted, however, that he thought the CSE meeting lasted approximately 45 minutes and that the preschool teacher—who attended the meeting via telephone—was only present on the telephone for approximately five minutes (see Tr. p. 416). The student's father also testified that, at the March 2018 CSE meeting, they requested that the student continue to attend ADAPT for the 2018-19 school year, as ADAPT had a school-age program, but they were told by the district school psychologist that "they want[ed] to look for a placement in [a] public school for her" and the student did not "qualify at all for [ADAPT]" (see Tr. pp. 417-19).[43]

The student's preschool teacher also testified at the impartial hearing (see Tr. pp. 465-85). With respect to the March 2018 CSE meeting, she testified that, while she was on the telephone at the CSE meeting, she did not hear anyone speaking in Spanish (see Tr. pp. 480-81). However, the preschool teacher also testified that during the two years that the student attended her preschool classroom, she spoke to the student's mother in English (see Tr. p. 477). She further testified that "if there was a complicated situation or things that either the mother [did not] understand, or [she

[42] At the impartial hearing, the preschool teacher testified that, at the March 2018 CSE meeting, she described the student's "need of having many modifications in her schedule," as well as a "flexible" schedule; the student "need[ed] to be around familiar people" because it took ADAPT staff "a lot of time" to get to know the student, her preferences, what was needed for her to attend to task, and to "be able to open up to a learning environment" (Tr. p. 478). She added that, "without all this, [the student] would just be crying continuously" (Tr. p. 478). According to the preschool teacher, she "couldn't have been [on the telephone with the CSE for] more than five minutes" (Tr. p. 479). The preschool teacher also testified that she informed the March 2018 CSE of the "importance" of having the student continue to attend ADAPT and "that [the student] has a big safety issue"—"crawl[ing] over other children" on the floor and "pull[ing] wires out"—and that the student had no "safety awareness," which required that she "be highly supervised at all times" (Tr. p. 479). The preschool teacher also testified that she explained to the March 2018 CSE the "absolute[] necessity" of the pool and that the student "needed to have an outdoor play environment to help her focus and attend to task," and specifically needed "to be on the swing outside" and to "have bright lights" (Tr. pp. 479-80). With regard to the pool, the preschool teacher testified that she told the March 2018 CSE how the pool affected the student in the classroom by "reliev[ing] her anxiety" and allowing her to be more able to "focus and attend[] to task better" (Tr. p. 480). She also told the March 2018 CSE that the student had "started to be able to walk with a gait trainer" after using the pool, and the student's "legs were actually able to walk, using the trainer, which before the pool, she wasn't able to do" (Tr. p. 480).

[43] At the time of this testimony at the impartial hearing, the student's pendency placement was being implemented in the school-age program at ADAPT (see Tr. p. 419; see also Tr. pp. 280-83, 291, 342-44; Interim IHO Decision at pp. 3-4).

herself did not] understand," she would ask a "Spanish staff member" who was "part of [the] class" to translate (Tr. p. 477).

The student's mother did not testify at the impartial hearing (see Tr. pp. 1-570).[44] Absent testimony from the student's mother, the hearing record is devoid of her own first-hand account of her experience attending the March 2018 CSE meeting (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III). Significantly, the student's father was not questioned about whether he interpreted information for the student's mother at the March 2018 CSE meeting—as he had at the July 2017 CPSE meeting—and the hearing record is otherwise devoid of evidence demonstrating what, if anything, the student's mother did not understand about either the development of the March 2018 IEP or the IEP process in general or how the absence of either an interpreter or translated documents relied upon by the CSE (or those provided after or concurrent with the March 2018 CSE meeting) significantly impeded her opportunity to participate in the decision-making process (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III). On appeal, the parents do not point to any evidence in support of this claim, other than noting the district's statutory and regulatory obligations to provide the parents' with certain documents in their native language and to testimony related to the July 2017 CPSE meeting (see Req. for Rev. ¶ 11; Parent Mem. of Law at pp. 9-11). Here, although the IHO did not find any procedural violation with regard to parent participation, the IHO nonetheless ordered the district, on a going-forward basis, to ensure that it provide the parents with "notifications in Spanish to the extent required by law" (IHO Decision at pp. 10-11, 15).

In addition, even if the March 2018 IEP, including the annual goals, were not specifically drafted at the CSE meeting, the parents do not assert any arguments or point to any evidence that the failure to do so "seriously infringe[d]" on their opportunity to participate in the creation of the IEP (S.B. v. New York City Dep't of Educ., 2015 WL 3919116, at *6-*7 [S.D.N.Y. June 25, 2015]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *8 [S.D.N.Y. Sept. 29, 2012]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *10-*11 [S.D.N.Y. Nov. 9, 2011]).

Thus, the evidence in the hearing record supports the IHO's conclusion that the parents had the opportunity to participate at the March 2018 CSE meeting, and any procedural irregularities did not significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. §1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

3. Predetermination

The parents argue that the March 2018 CSE impermissibly engaged in predetermination by failing to consider other placement options, and specifically failed to consider allowing the student to "remain at ADAPT." According to the parents, the March 2018 CSE ignored the recommendations from the preschool teacher and from themselves for the student to continue at ADAPT, and had no "legitimate reason (or any reason at all)" for changing the student's

[44] An interpreter was present at every impartial hearing date when the student's mother was present (see Tr. pp. 15, 126, 202, 275, 357, 461, 550). Notably, on September 13, 2019, the interpreter was not present at that impartial hearing even though the student's father attended the impartial hearing, but without the student's mother (see Tr. p. 499).

educational placement from ADAPT to a district specialized school. The parents also argue that all the ADAPT progress reports supported that the student remain at ADAPT. In addition, the parents contend that neither the March 2018 prior written notice nor the March 2018 IEP, itself, indicated that the CSE considered a State-approved nonpublic school, such as ADAPT, as an option.[45]

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]).

Based upon a review of the evidence in the hearing record, it is undisputed that, consistent with the parents' contentions, the student's father and the preschool teacher voiced their recommendations for the student to remain at ADAPT for the 2018-19 school year at the March 2018 CSE meeting (see Tr. pp. 417-19, 479, 481; Dist. Ex. 2 at p. 17).[46] However, although the parents contend that all the ADAPT progress reports available to the March 2018 CSE supported that the student remain at ADAPT, an examination of those documents—an undated "Turning Five Teacher Report"; August 2017 progress reports for OT, PT, and speech-language therapy; and an August 2017 quarterly report (prepared by preschool teacher)—do not include any such recommendation (see generally Dist. Exs. 6; 14-17).[47] Instead, in each of the August 2017

[45] To the extent that the parents argue that the district failed to offer the student a FAPE for the 2018-19 school year because the March 2018 CSE violated the district's own policy concerning deferrals to the CBST—i.e., the CSE failed to have any documents required by its own policy for a CBST deferral available at the meeting—the parents do not point to any legal authority for the proposition that such violation either violated the IDEA, State laws, or State or federal regulations (see generally Req. for Rev.; Parent Mem. of Law). Notably, the district school psychologist testified that if the March 2018 CSE decided to defer the student's case to the CBST as an appropriate service, the CSE had the authority to do so (see Tr. p. 156). As such, this argument will not be further addressed.

[46] In the memorandum of law, the parents argue that, according to the preschool teacher's testimony, the March 2018 CSE was dismissive of the preschool teacher's recommendation for the student to remain at ADAPT (see Parent Mem. of Law at p. 17, citing Tr. p. 474). That portion of the preschool teacher's testimony related to her attendance at the July 2017 CPSE meeting (see Tr. pp. 471-74) and the information she relayed to the CPSE about the student's use of the pool at ADAPT, not to the preschool teacher's attendance at the March 2018 CSE meeting (see Tr. p. 474).

[47] While the progress reports referred to by the parents predated the March 2018 CSE meeting, the March 2018 prior written notice did not identify these documents as evaluative information relied upon to develop the March

progress reports the reporter had the option in a final paragraph to indicate whether a "new CPSE/CSE review" was needed to "change the IEP ([were] there modifications to the duration/frequency/ of [the] educational program)?" or were "changes required to [the] annual goals or objectives" (Dist. Ex. 14 at p. 4; 15; 16 at p. 1; 17 at p. 2). Each reporter checked "no" as the response (Dist. Ex. 14 at p. 4; 15; 16 at p. 1; 17 at p. 2). The undated "Turning Five Teacher Report" similarly contained no recommendation for the student to remain at ADAPT (Dist. Ex. 6 at pp. 1-4).

Next, the evidence in the hearing record demonstrates that the March 2018 IEP specifically noted as a "Parent Concern" that the parents wanted the student to "continue in [the] current school" (Dist. Ex. 2 at p. 17). According to the March 2018 IEP, the CSE considered, but rejected, the following placement options: general education, a 6:1+1 special class in a specialized school, and an 8:1+1 special class in a specialized school (id.). As noted in the IEP, the March 2018 CSE rejected those placement options because the student, as a "nonverbal and non-ambulatory child . . . require[d] adult supervision throughout her school day" and, given her multiple disabilities, the student required a "specialized program," "1:1 supervision," and "more intensive specialized instruction to address her needs" (id.). As such, the student needed a "more intensive adult [to] student ratio" (id.).[48]

At the impartial hearing, the district school psychologist testified that prior to the March 2018 CSE meeting, she reviewed the student's documents and spoke to the student's preschool teacher and the student's father (see Tr. pp. 36-37). Based upon that information, the district school psychologist understood that, at that time, the student attended a 12:1+3 special class and received the services of an individual paraprofessional, as well as OT, PT, and speech-language therapy (see Tr. p. 37). She described the student as a "child with very severe and significant delays" that required supportive services "to participate and have access to the curriculum" (Tr. pp. 37-38). She also testified that the student "was in a wheelchair" and non-ambulatory, that "her communication was delayed," and she needed "a lot of assistance" (Tr. p. 39). In addition, the student could "crawl or climb" with supervision and "always needed a one-to-one assistance" (Tr. p. 39).

At the March 2018 CSE meeting, the CSE found the student eligible for special education as a student with multiple disabilities (Tr. p. 40). The district school psychologist explained that a multiple disabilities classification entailed "all of the disabilities that might be physical, might be cognitive, and all of those impairments that in this case [the student] was presenting" (Tr. pp. 40-41). She also testified that the CSE recommended a 12:1+4 special class at a district specialized school (see Tr. p. 41). The district school psychologist described a 12:1+4 "program [as] a program for students with severe and significant needs" that required "one-to-one attention and that ha[d]

2018 IEP (see Dist. Ex. 3 at pp. 1-2). However, a description of the student's present levels of physical development within the IEP referred to an August 2017 progress report, which correlated, in part, to information in the August 2017 quarterly progress report prepared by the preschool teacher and to an August 2017 PT progress report (compare Dist. Ex. 2 at pp. 2-3, with Dist. Ex. 14 at p. 1, and 15).

[48] While the March 2018 prior written notice reflected the same placement options considered and rejected at the CSE meeting, the prior written notice did not specifically reflect the parents' concern that the student remain at her current school, ADAPT, for the 2018-19 school year (compare Dist. Ex. 3 at pp. 1-2, with Dist. Ex. 2 at p. 17).

medical issues" requiring the "supervision of more of those adults in the room" (Tr. p. 41). The March 2018 CSE also recommended to continue the student's OT, PT, speech-language therapy, and 1:1 paraprofessional services (see Tr. p. 42). According to the district school psychologist, the student required the 1:1 paraprofessional for "ambulation, feeding, and just in case [] there [was] a crisis or any behavioral . . . issues" (Tr. p. 42).[49]

The district school psychologist testified that the parents agreed with these recommendations, but expressed disagreement because "there was no pool" (Tr. p. 45). She explained that the student had been receiving pool therapy in her preschool program, and the parents "were concerned that we [did not] have a pool so she w[ould] not receive that type of therapy in the school" (Tr. pp. 45-46). When asked how that was addressed in the IEP, the district school psychologist testified that she explained that the CSE "work[ed] with the students in transferring the information—the educationally-based programs" and that the pool therapy was a "medically-based program that we d[id] not provide"; thus, the CSE was "looking into all the appropriate educationally-based program" (Tr. p. 46). She later explained during cross-examination that the CSE's responsibility was to recommend programs that "all relate[d] back to the curriculum and how it help[ed] the students access the curriculum, and access and participate in the classrooms" (Tr. p. 73). She also testified that the parents wanted the student to "continue in the same program," but the student was offered a seat in a 12:1+4 special class in a district specialized school (Tr. p. 46).

During cross-examination, the district school psychologist admitted that she did not "name any specific schools for [the parents] to visit at the meeting" (Tr. pp. 58-59). She also testified that the CSE only recommended programs, such as the 12:1+4 special class, and did not recommend specific school sites (Tr. p. 55). She explained that "placement officers will place the students" after the CSE meeting, and no "placement officer" attended the March 2018 CSE meeting (Tr. pp. 55-56, 58). In addition, the district school psychologist testified that although she and the district social worker (who attended the March 2018 CSE meeting and who conducted a classroom observation of the student in February 2018) shared an office and consulted with each other about the student's information and the "ongoing process" before the CSE meeting, she and the social worker did not "discuss the services" to be recommended for the student before the CSE meeting—only at the meeting—but they had discussed the "services the [student] already had" (Tr. pp. 79-80). She also testified that, at the March 2018 CSE meeting, the CSE did "not recommend a specific school" and confined the CSE's recommendations to the services (Tr. p. 80). In addition, when asked what the preschool teacher recommended, the district school psychologist responded, "for [the student] to continue in the same setting," meaning a 12:1+4 special class, not ADAPT because the CSE did not recommend a specific school (Tr. pp. 80-81). She further testified that the "option" to defer the student's case to the CBST was considered at the meeting, because the CSE discussed the parents' concern for the student to remain at ADAPT (Tr. pp. 156-57). The district school psychologist explained that the student's case was not deferred to the CBST because the CSE determined that the district would "be able to provide the services" (Tr. pp. 157-58).

At the impartial hearing, the preschool teacher testified that, during the March 2018 CSE meeting while she was on the telephone, a deferral to the CBST was mentioned; she also testified

[49] The district school psychologist testified that, while not certain, she believed the March 2018 CSE meeting lasted approximately 1 to 1.5 hours (see Tr. p. 76). She also believed the preschool teacher remained on the telephone for the "majority of the meeting" (Tr. p. 77).

that she asked if the student could stay at ADAPT, but was told that the CSE "had nothing to do with it, that the paper would be processed" (Tr. p. 481).

Given the evidence in the hearing record, even if the March 2018 CSE did not engage in a robust discussion about allowing the student to remain at ADAPT—a nonpublic school—once the March 2018 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 [LRE] 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 [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]).

4. Evaluative Information

The parents argue that the district failed to establish whether the March 2018 CSE considered the "most recent evaluation" at the CSE meeting, including progress reports from ADAPT, and whether the district conducted "any evaluations in connection with the 2018 IEP."[50] More specifically in the memorandum of law, the parents contend that the district should have conducted a "social-emotional evaluation to assess the impact a change in program would have had on [the student]," especially since the district was "considering removing [the student] from the only school that she had attended. Additionally, the parents contend that the district should have assessed the student's special transportation needs "in connection with the proposed change in school location" because ADAPT was a "few blocks from her home and close to the hospital" where she received services.[51]

In developing the recommendations for a student's IEP, the CSE must consider 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

[50] As to the parents' argument that the district failed to establish whether it conducted a "reevaluation prior to making an admitted change in placement" and that the March 2018 CSE "should have had clinical documentation to support a change," 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]).

[51] The parents also assert that the March 2018 CSE did not consider an assistive technology evaluation of the student despite evidence in the hearing record that the student was "non-verbal and using [assistive technology] in her current classroom." This issue will be addressed below.

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]).

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

In deciding whether the March 2018 CSE had sufficient evaluative information, the inquiry logically focuses on identifying what documents the CSE relied on to develop the IEP. Here, the district school psychologist initially testified that the March 2018 CSE possessed PT, OT, and speech-language "evaluations and reports, and progress reports"; "all the pre-K information, as well as quarterly reports"; the student's "pre-K" IEP or "CPSE IEP"; and "some medical information" the parents had provided related to the student's transportation needs (Tr. pp. 54, 82-83, 85-87).[52] Given that the student had attended ADAPT for two years, the parents' attorney asked the district school psychologist if she could further identify the specific documents with a date (see Tr. pp. 83-85). To assist in this request, the district school psychologist testified that the March 2018 CSE relied on the documents that were "listed in the prior written notice," but then added that the CSE also had the justification for the paraprofessional provided by the parents—so the prior written notice only reflected some of the documents relied upon by the CSE (Tr. p. 85).

When the parents' attorney then attempted to confirm with the district school psychologist that the March 2018 CSE had the documents in the prior written notice plus the justification document, the district school psychologist testified that the CSE also had the "annual educational report, the [BIP]," and "[a]ll the documents that were listed on the disclosure list" (Tr. pp. 85-86).[53]

[52] The school psychologist subsequently testified that the parents provided the March 2018 CSE with a "physical examination" document and a "medical release" from the Office of Pupil Transportation for bussing purposes which were not entered into evidence (Tr. pp. 94-95).

[53] The district school psychologist also testified that the parents had copies of all of the documents listed in the

However, as the cross-examination of the district school psychologist continued, the witness began referring to additional documents—such as a psychological evaluation—as being available to the March 2018 CSE (see Tr. pp. 102-03). Somewhat troubled by the district school psychologist's expansion of her previous testimony identifying the documents available and relied upon by the CSE, the parents' attorney inquired further with the witness by asking whether any minutes had been taken during the CSE meeting(see Tr. pp. 102-03). The district school psychologist responded, "[y]es," and that she had "them in front of [her]" (Tr. p. 103). The district school psychologist described the minutes as a "conference checklist . . . in SESIS," which "just check[ed] the participants" and "teacher progress reports available" in this case, noting that a "speech progress report" had been available (Tr. pp. 103-05). The IHO then reminded the district school psychologist that that specific document had not been provided through disclosure and if she had a document that others did not have "that's not good" (Tr. p. 104).

During the discussion about the checklist, the parents' attorney noted that the document should have been turned over based upon a subpoena issued (see Tr. pp. 103-04). The district's attorney apologized for not providing the document, stating that she "thought [she had] provided everything in SESIS"; the IHO then noted that a copy would be obtained (Tr. pp. 104-05). The hearing record, however, does not include a copy of the checklist (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III).

Based on the foregoing and absent a copy of the checklist, the March 2018 prior written notice constitutes the most reliable evidence demonstrating what documents the March 2018 CSE relied upon to develop the IEP—this is especially true, where as here, the district, in reciting the "material facts" in the answer, noted that the March 2018 CSE relied on a "classroom observation, [the student's] [OT], speech/language therapy, and [PT] progress reports, as well as an annual education report" to prepare the IEP and cited directly to the prior written notice (Answer & Cr. App. ¶ 6, citing Dist. Ex. 3 at p. 2).

In addition, with the exception of one internal reference to an "August 2017 progress report," the March 2018 IEP did not identify what evaluative information the CSE relied upon to develop the IEP for the 2018-19 school year (see Dist. Ex. 2 at pp. 1-4). Although the March 2018 prior written notice did not reflect that the CSE had considered any evaluative information dated "August 2017," a comparison of the description of the student's physical development in the March 2018 IEP mirrored information about the student's gross motor skills found, in part, within an August 2017 quarterly progress report and, in part, within an August 2017 PT progress report (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 3 at p. 2, and Dist. Exs. 14 at p. 1, and Dist. Ex. 15). A similar comparison of the annual goals in the March 2018 IEP reveals that at least three of the goals—readiness skills, ADL or self-help skills, and play skills—were drawn directly from the July 2017 CPSE IEP, which the prior written notice also failed to include as a document relied upon to develop the March 2018 IEP (compare Dist. Ex. 2 at pp. 8-9, with Dist. Ex. 7 at p. 5, and Dist. Ex. 3 at p. 2).

In summary, the evidence in the hearing record indicates that the March 2018 CSE relied upon the following to develop the IEP: the July 2017 CPSE IEP, an August 2017 PT progress report, an August 2017 quarterly progress report, a December 2017 OT progress report, a

prior written notice, "plus the justification and the BIP" relied upon at the March 2018 CSE meeting, in addition to the documents the parents had provided to the CSE (Tr. pp. 93-94).

December 2017 PT progress report, a January 2018 speech-language progress report, a January 2018 annual educational report, and a February 2018 classroom observation (see generally Parent Exs. D-G; Dist. Exs. 5; 14-15).

Turning now to whether the documents relied upon constituted sufficient evaluative information, the August 2017 quarterly progress report, prepared by the preschool teacher, described the student as having global developmental delays (see Dist. Ex. 14 at p. 1). At that time, the student "walk[ed] with the walker 30 minutes in the morning and 30 minutes in the afternoon" (id.; see Dist. Ex. 2 at p. 3). It further noted that the student was "beginning to explore lighted/musical toys for longer periods of time," she continued to "exhibit a 'Startle Reflex'" and was "self-directed most times," which required that the student be "highly supervised" (Dist. Ex. 14 at p. 2; see Dist. Ex. 2 at p. 1). According to the progress report, the student "easily move[d] from toy to toy and [was] not yet safety aware, especially during floor time" (Dist. Ex. 14 at p. 2; see Dist. Ex. 2 at p. 1). Using the rubric included in the progress report, the student's then-current progress toward meeting the annual goals identified in the report were all rated as "2," meaning "some progress made" (Dist. Ex. 14 at pp. 1-3). However, the report indicated that the student's "progress [was] sufficient so that annual goals [were] projected to be met by the end of the IEP" and the preschool teacher did not recommend changes to the PT duration, frequency, or annual goals (id. at p. 4).

The August 2017 PT progress report addressed the student's progress toward her goals related to independent standing and cruising tolerance and her ability to ambulate 200 feet independently (Dist. Ex. 15). According to a rubric included in the progress report, the student's then-current progress toward meeting those goals was rated as "2," meaning "some progress made" (id.). The accompanying narrative indicated that the student was able to crawl reciprocally and navigate her environment, sit with fair balance on a small chair, and able to pull to stand and cruise a few steps to the side (id.). At the time of the report, the student had recently begun using a posterior walker with hip guides and a safety belt, ambulating 50 feet with "min/mod" assist for steering and safety (id.). According to the report, the student did not remain in one place for an extended period of time, did not "obey commands," and did not stand independently (id.). However, the report indicated that the student's "progress [was] sufficient so that annual goals [were] projected to be met by the end of the IEP" and the physical therapist did not recommend changes to the PT duration, frequency, or annual goals (id.).

The December 2017 PT progress report reflected the student's diagnoses and use of solid ankle foot orthotics, and indicated the evaluation measures included the "PDMS-II," the HELP Gross Motor Profile, clinical observation, and a chart review (Parent Ex. D at p. 1).[54] The PT progress report indicated the student could "maintain a kneeling position with minimal assistance, while performing tabletop activities," "short sitting on a bench with maximal support," and "a quadruped position" (id. at p. 1). Additionally, the student demonstrated the ability to roll independently and crawl (id.). The student required moderate assistance transitioning from a supine to sitting position, and maximal assistance when transitioning from sitting to standing (id.). She was able to pull herself up to standing from a quadruped position independently and could maintain standing with maximal assistance (id.). According to the report, the student ambulated with a gait trainer with maximal assistance and was dependent in all activities of daily living (id.).

[54] PDMS-2 is the acronym for the Peabody Developmental Motor Scales, 2nd Edition.

The progress report indicated that the student's bilateral upper and lower extremity passive range of motion was within normal limits and that her "[m]uscle tone appear[ed] low in her trunk [and] bilateral upper and lower extremities" (id. at p. 2). With regard to posture the student "present[ed] with kyphosis in her thoracic spine, abducted scapular, and decreased lordosis" (id.). Finally, the student's balance, equilibrium and protective reactions appeared delayed at that time (id.). Overall results of the evaluation revealed that the student demonstrated "scattered gross motor delays up to the 11 to 14 month range," indicative of an approximate 60 percent delay in that area (id.).

The December 2017 OT progress report was based upon clinical observation, communication with the student's teacher, and results of the "HELP Checklist" (Parent Ex. E at p. 1). According to the occupational therapist, the student was "able to sit up unsupported when willing," crawled for mobility, and had "begun to weight bear and alternate feet while positioned in a walker with a saddle" (id.). The report indicated that the student "demonstrate[d] limited to no attention to non-preferred tasks presented and require[d] hand over hand assistance for most object manipulation tasks" (id.). The occupational therapist reported that the student had "not shown the ability to follow simple commands," and exhibited limited eye contact, functional play skills, and mouthing of fingers or toys (id.). Additionally, the student's upper extremity range of motion was within normal limits, and she exhibited decreased muscle strength and tone as well as impaired equilibrium and protective extension reactions (Parent Ex. E at p. 2). According to the report, the student was not tolerant of therapist handling and she often resisted different position such as kneeling, being placed prone over a wedge, or balancing on a bolster (id.). The student presented with decreased motor control when crawling on inclines and declines, and often needed prompts to keep her arms in a constant forwarding motion when climbing as well as additional support to use them when entering or leaving an incline or decline (id.).

With regard to the student's fine motor skills, the OT annual report indicated that she did not demonstrate a hand preference, rather used both hands freely (Parent Ex. E at p. 2). Specifically, the student was able to "swipe objects" and grasp and release objects at random but did not do so following verbal or tactile command (id.). The student reached in all planes to obtain an object of her preference and attempted to push down buttons but had decreased strength (id.). She held objects with one or two hands and attempted to bring them towards her mouth but did not typically transfer objects, and she manipulated various toys, appearing to prefer objects with light and sound (id.). Although she did not tolerate it, the report indicated that the student required hand over hand assistance for visual motor activities such as using crayons, large puzzle pieces, and pegs (id.). With regard to sensory processing, visually, the student did not demonstrate sustained eye contact (id. at p. 3). Auditorily, the student tolerated sounds and loud noises around her but did not turn her head to look when her name was being called (id.). Tactically, the student did not tolerate therapist handling, did not seem responsive to different sensory input such as vibration or a sensory board comprised of various textures, and wore bilateral elbow splints to prevent the mouthing of her hands (id.). Proprioceptively, the occupational therapist reported that the student was able to tolerate vestibular input provided by the therapy swing (id.). The occupational therapist reported that the student was dependent in all areas of self-care and was "on a puree food diet," and concluded that based upon the results of the assessment and observation, she "appear[ed] to have over a 70 percent delay" (id. at pp. 1, 2).

The January 2018 speech-language progress report indicated that the student's receptive and expressive language skills were assessed using the Non-Speech Test for Receptive and Expressive Language Abilities as well as clinical observations (Parent Ex. F at p. 2). According

to the assessment results, the student demonstrated both significantly delayed receptive language skills at the 11-13 month age level and expressive language skills at the 8-10 month level (id. at pp. 2, 4). Observations included in the report were that the student responded inconsistently to speech and sounds in her environment, she tracked objects visually, and was responsive to interaction (id. at p. 2). The report indicated that the student appeared to be aware of her environment, she intermittently established and maintained eye contact with people especially in response to her name, she was very attentive to activities presented to her, and she attended with interest for several minutes to a book consisting of various pictures of items (id. at p. 3). The student was observed to touch and press levers on a cause/effect toy although she needed hand-over-hand assistance for further toy exploration (id.). During the evaluation the student did not follow directions, identify objects, or respond to any form of questions (id.). Expressively, the student's skills consisted of her producing an open vowel sound /a/ that she initiated (id.). The speech-language pathologist reported that "[s]miling was evident when [the student was] content," and "[c]rying was occasionally observed" when she was "distressed" (id.). Overall, the student's communication was characterized by facial expressions, smiling, and crying, and her play skills consisted of reaching, touching toys and attempting to press levers (id.). Regarding the student's oral motor and feeding skills, the speech-language pathologist reported that the student was "a dependent feeder" with emerging chewing skills who exhibited tongue lateralization and lip approximation skills while being spoon-fed thickened puree foods (id. at p. 2). The student drank small amounts of thickened liquid from a cut out cup with jaw support and did not exhibit coughing during either eating or drinking (id.).

In January 2018 annual educational report prepared in anticipation of the student's annual review, the preschool teacher noted that it was "based on current observations by her classroom team"; the "HELP Checklist, 0-3"; and "The Brigance Inventory, Birth-Three," which indicated that in all areas measured the student was functioning under the 12-month level representing a greater than 33 percent delay (Parent Ex. G at p. 1).[55] In the area of cognitive development, the report indicated that the student had "increased her overall attending skills," "appear[ed] to be comfortable in her environment, and [was] no longer 'fussy' when engaged in an activity, perhaps due in part to her 1:1 para[professional] who often redirect[ed] [the student's] focus and attention" (id.). At the time of the report, the student could "keep a cause/effect toy on her tray while exploring the toy," and "push down on levers, turn knobs and open small latches/doors" (id.). The preschool teacher reported that the student was "beginning to make choices from a field of two and show[ed] preferences for certain toys and musical selections" (id.). In addition, she "sometimes anticipate[d] puppet play by reaching out and visually focusing on a puppet or other various props" (id.). According to the report, although the student "continue[d] to require hand-over hand assistance to help her stay motivated, focused, and participating in class activities, her self-directing behavior ha[d] diminished to some degree" (id.). The student did "not yet imitate simple motoric movements such as pointing, clapping or tapping," she was "not yet aware of colors, numbers, letters or shapes," and did not yet respond to her name, recognize her belongings, or follow one-step directives (id. at p. 2).

Next, the preschool teacher reported that the student was nonverbal and "mainly communicate[d] by smiling/crying" and was "beginning to vocalize some open-vowel sounds" that

[55] The January 2018 annual educational report also contained information about the student's gross motor skills that was consistent with the physical therapist's observations and assessment results (compare Parent Ex. D at pp. 1-2, with Parent Ex. G at p. 2).

she inconsistently used to communicate with others (Parent Ex. G at p. 2). During circle time, the student was "beginning to recognize some simple actions" such as smiling in anticipation of bubbles (id.). At that time, the student did not yet imitate non-speech jargon, consonant sounds, or vowel/consonant sound blends, or participate in vocal play (id.).

With regard to the student's sensory and fine motor development in the classroom setting, the January 2018 annual educational report indicated that the student had "increased her tolerance for hand cream and sensory brushing, followed by joint compressions" (Parent Ex. G at p. 2). According to the report, "[s]he was more comfortable with wet/dry sensory activities and actually seem[ed] to enjoy th[o]se activities now, given full hand-over-hand support" (id.). Although the student "continue[d] to be very active requiring frequent short activities to maintain her attention, she [] participate[d] in craft activities such as crumpling paper, finding the glue spots to place the paper on and shaking glitter to complete the project" (id.). The student also "tolerate[d] finger painting" and "actually seem[ed] to enjoy th[at] activity" (id.). The preschool teacher reported that the student did not yet "rip or snip paper, build a 2-3 block tower, place objects in/out [of] a container, pop bubbles or complete a 1-2 piece puzzle given verbal prompting and physical cues (id.).

Regarding the student's gross motor skills, the January 2018 annual educational report reflected that at that time the student was "beginning to demonstrate increased stability when wa[l]king with a walker and gate trainer" (Parent Ex. G at p. 2). The student had "increased her overall endurance and [could] 'cruise' down the hallway several time a day given support and prompting cues (id.). The preschool teacher reported that the student could "'pull to stand', and maintain a weight bearing posture when placed on all four limbs and crawl around the room" (id.). According to the report, the student had "increased her tolerance of weight bearing when placed on a prone stander for longer amounts of time and [could] tolerate her orthotics for almost the entire day" (id.). Further, "[d]uring floor time, [the student] use[d] her peripheral vision, to explore a lighted/musical toy up-close while exhibiting a 'Startle Reflex'" (id.). Additionally, the preschool teacher reported that the student was "not yet safety aware and [would] sometimes crawl over other children and/or reach for items tucked away" (id.). The student did not demonstrate the ability to "complete a simple obstacle course, roll, throw, or catch a ball" (id.).

According to the preschool teacher's report, the student was "beginning to be more socially aware" and "inconsistently engage[d] in observing her class mates and familiar people in the room" (Parent Ex. G at p. 3). The student was observed to smile and look towards other students and at times, reach out to touch another students, and did "not recoil when other children tr[ied] to engage her" (id.). The report also noted that the student did not yet greet other students, familiar adults, share her toys, or play in a two-way exchange (id.).

With regard to the student's self-help skills, the January 2018 annual educational report indicated that the student was "now a good eater and appear[ed] to enjoy home-made pureed food her mother prepare[d] for her each day" (Parent Ex. G at p. 3). The student was aware when presented with food and would open her mouth in anticipation (id.). The report indicated that the student used a rotary tongue movement to move her food from side to side, was able to pucker and retract her lips during eating, could establish a seal on a spoon, and swallowed appropriately (id.). She "use[d] a 'nose cup' for liquids and [could] drink water and juice with spillage given assistance and support" (id.). The student was "beginning to inconsistently hold her own spoon and cup given verbal prompting and physical cues" (id.). Additionally, the student was "beginning to

inconsistently hold her arms up during dressing, given cues" (id.). Further, the educational report included that the student did not yet eat finger foods or wipe her mouth with a napkin when needed (id.). She was not yet toilet trained or aware of her diaper being wet/soiled (id.). The preschool teacher reported that the student was reliant on adult intervention for all activity of daily living skills (id.).

A February 2018 classroom observation report prepared by the district social worker who attended the March 2018 CSE meeting indicated that the student needed 1:1 supervision all day and communicated by smiling and crying (see Dist. Exs. 2 at p. 19; 5). According to the report, the student was not able to ambulate on her own, but she crawled and climbed with supervision to ensure she did not fall back while climbing (see Dist. Ex. 5). However, if an adult held both her hands, she was able to walk on her tiptoes for a short period of time (id.). The report indicated that the student was not able to express her wants and needs, was self-directed, was not aware when she was soiled or wet, and ate puréed foods (id.). The student participated in activities with the help of the 1:1 paraprofessional, smiled and reacted when she heard music, and liked when someone sang to her (id.). According to the report the student was in constant motion, she tended to grind her teeth and mouth things including her hands, and she opened her mouth when food was offered to her (id.).

Turning to the March 2018 IEP, the present levels of performance and individual needs reflected that the student was aging out of preschool and would begin kindergarten in September 2018 (see Dist. Ex. 2 at p. 1). The IEP referenced the student's then-current placement at ADAPT in a 12:1+3 classroom and that she received OT, PT, and speech-language therapy services (id.). In addition, the IEP noted that the student was non-ambulatory, non-verbal, and diagnosed as having "global developmental delays secondary to Trisomy 13 syndrome," ventricular septal defect, and glaucoma (id. at pp. 1, 3).

Consistent with the January 2018 annual educational report, the March 2018 IEP indicated that the student was able to tolerate both wet and dry sensory activities for short amounts of time, was self-directed, and needed verbal prompting and hand-over-hand assistance to help her stay motivated, focused, and participating in class activities (Dist. Ex. 2 at p. 1; see Parent Ex. G at pp. 1, 2). During more structured activities such as circle time, the student inconsistently exhibited the ability to keep musical instruments on her tray and bells on her wrist, and she also explored her environment and moved from toy to toy by crawling on the floor (Dist. Ex. 2 at p. 1). Included in the IEP and consistent with the annual educational report, the student did not demonstrate safety awareness, especially during floor time, and at times crawled over other students or reached for items tucked away (Dist. Ex. 2 at p. 1; see Parent Ex. G at p. 2). The IEP indicated that although the student continued to make progress, the repetitive behavior of putting her fingers in her mouth limited her progress; however, the introduction of elbow splints had decreased that behavior (Dist. Ex. 2 at p. 1; see Parent Ex. E at p. 3). According to the IEP the student explored lighted/musical toys using her peripheral vision—exhibiting a startle reflex—and cause and effect toys by mouthing them and leaving them on her tray (Dist. Ex. 2 at p. 1; see Parent Exs. E at p. 1; G at p. 2).

The March 2018 IEP indicated that with some difficulty, the student demonstrated the ability to hold a toy with both hands and was beginning to transfer objects from one hand to another while exploring them (Dist. Ex. 2 at p. 3; see Parent Ex. E at p. 2). The student was also able to reach for and pick up objects, and intentionally swipe at them (Dist. Ex. 2 at p. 3; see Parent Ex. E

at p. 2). The IEP stated that "[g]iven physical cues and verbal prompting," the student could "be redirected to explore new and challenging activities" (Dist. Ex. 2 at p. 1). According to the IEP the student held her head upright while maintaining an upright posture when sitting (Dist. Ex. 2 at p. 3; see Parent Ex. E at p. 1). The IEP also reflected information from the August 2017 PT progress report, as well as more recent reports, which indicated that the student use a "Rifton chair," was "beginning to use a walker with adult assistance," was "able to crawl reciprocally and navigate her environment," "sit with fair balance on a small chair," "pull to stand and cruise" a "few steps to the side," and was using a "posterior walker with hip guides and a safety belt" (Dist. Ex. 2 at p. 3; see Parent Exs. D at p. 1; F at p. 2; G at pp. 1, 2; Dist. Ex. 15). Additionally, the IEP reflected reports that the student did not remain in one place for an extended period of time, she did not stand independently, she liked to climb with assistance and was "constantly in motion" (Dist. Exs. 2 at pp. 1-3; see Parent Ex. G at p. 2; Dist. Exs. 5, 15).

Regarding the student's communication skills, the March 2018 IEP reflected reports that the student was nonverbal, and communicated by laughing or crying to make her needs known (Dist. Ex. 2 at p. 1; see Parent Exs. F at pp. 1, 3; G at p. 2). The student was "beginning to inconsistently vocalize some open vowel sounds" and "produce[d] vowel like sounds to express distress/excitement" although she did not vocalize or imitate words or sounds, imitate or participate in vocal play, or respond to familiar words (Dist. Ex. 2 at p. 1; see Parent Ex. G at p. 2). According to the IEP the student engaged with cause and effect toys given multisensory cues, and manipulated toys and her environment (Dist. Ex. 2 at p. 1; see Parent Ex. F at pp. 2, 3; G at p. 1, 2). The IEP indicated that the student did not follow "commands" (Dist. Ex. 2 at p. 1; see Parent Exs. E at p. 1; F at p. 3; G at p. 2).

The March 2018 IEP described the student's oral-motor and feeding skills, in that she consumed a pureed food diet, "demonstrate[d] [an] emerging munching chewing pattern" when provided with "multisensory cues and jaw support," drank regular liquids "from a cut out cup with moderate spillage given jaw support and oral motor stimulation," and demonstrated an "emerging sip/swallow pattern using a honey bear straw given maximum support" (Dist. Ex. 2 at pp. 2, 3; see Parent Exs. F at p. 2; G at p. 3). According to the IEP the student "exhibit[ed] [a] closed labial seal during rest with minimal tongue protrusion" and "continue[d] to produce a lot of oral secretion[s] even when a swallow [was] elicited" (Dist. Ex. 2 at p. 2; see Parent Ex. F at p. 2). The IEP indicated that the student's swallow was "slow" although no signs of aspiration were present (Dist. Ex. 2 at p. 3; see Parent Exs. F at p. 2; G at p. 3).

Socially, the March 2018 IEP indicated that the student had made progress establishing eye contact, albeit fleeting, when her name was called (Dist. Ex. 2 at p. 1; see Parent Ex. F at pp. 2, 3). The student also inconsistently responded to her name given cues (Dist. Ex. 2 at p. 1). She had begun to smile upon arrival to the classroom, and in response to a familiar voice or music (Dist. Ex. 2 at p. 2; see Parent Ex. F at p. 2). The student also enjoyed when an adult sang a song to her that she liked (Dist. Ex. 2 at p. 2; see Parent Ex. G at p. 1). According to the IEP the student occasionally showed preference by crawling towards a familiar person, and she played alongside peers, at times crawling over them, yet did not actively play with them (Dist. Ex. 2 at p. 2; see Parent Ex. G at p. 3). The IEP indicated that the student often appeared to be observing peers and familiar people in the classroom, tilting her head towards them but not reaching out to touch them

(Dist. Ex. 2 at p. 2; see Parent Ex. G at p. 3).[56] Additionally, the IEP reflected the report that the student did not greet other students or familiar adults, share her toys with peers, or play in a two-way exchange (Dist. Ex. 2 at p. 2; see Parent Ex. G at p. 3).

Regarding the student's self-help and management needs, the March IEP indicated that the student was not yet aware of her diaper being wet/soiled, and did not assist with the diaper change although she had been observed lifting her arms in anticipation of putting on her coat given cues and support, demonstrating emerging dressing assist skills (Dist. Ex. 2 at p. 3; see Parent Exs. E at p. 2; G at p. 3). The parents reported and the IEP reflected their concerns that the student was "not able to focus on task for a[] long period of time," and that she "demonstrate[d] very poor awareness of safety and require[d] constant supervision," in that she threw objects, pulled at items within reach, moved quickly, and would "injure herself if not constantly watched" (Dist. Ex. 2 at pp. 2, 3; see Parent Ex. G at p. 2; Dist. Ex. 5). The student also "present[ed] with unsafe behaviors to others as well, unintentionally hurting them because she [was] unaware of her body in space and of the consequences of what she [was] doing" (Dist. Ex. 2 at p. 3; see Parent Ex. G at p. 2). According to the IEP, "[b]ased on the reports, although [the student] continue[d] to make progress, current testing and classroom observations demonstrate[d] [that] global delays remain[ed] present in all areas of development" (Dist. Ex. 2 at pp. 2, 4; see Parent Ex. G at p. 3). The student was "reliant on adult intervention to provide hand-over-hand assistance to keep her motivated, focused and attending to task" (Dist. Ex. 2 at pp. 2, 4; see Parent Ex. G at p. 3). Additionally, the IEP reflected reports that the student was "particularly vulnerable due to her generally poor engagement, attention, and mastery motivation combined with poor retention skills;" she did "not retain information learned given any extended break from school and usually regresse[d]" (Dist. Ex. 2 at pp. 2, 4; see Parent Ex. G at p. 3). Accordingly, the IEP indicated that the student "continue[d] to benefit from a classroom placement to help her function and attain age appropriate skill levels," in that "[t]his placement would provide the consistency of instructional strategies that [would] help enable [the student] to build a solid foundation of learned skills, re-mediate learning delays, prevent further regression of skills and provide an optimal environment for social emotional growth" (Dist. Ex. 2 at pp. 2, 4; see Parent Ex. G at p. 3).

In consideration of the information described above, the March 2018 CSE determined that the student "would benefit from a small environment with [a] small student to teacher ratio that utilize[d] a multi-modal learning approach" and which used "manipulatives, visual cues, picture symbols, hand-over-hand assistance, physical prompts and cueing, verbal prompts, redirection to task, differentiated instruction, modeling, repetition, and scaffolding of new instructional material, additional time to process information, sensory stimulating activities, direct teacher assistance, small group activities, [and] frequent teacher check ins" (Dist. Ex. 2 at p. 4). Additionally, the CSE identified that the student "would benefit from improvement in her communication and socialization skills, peer interaction, coping skills, and safety awareness;" "[s]he also need[ed] to increase her sensory sensitivity to sounds, textures, and food" (id.). The student "require[d] maximum support in gross and fine motor skills, self-help, and communication," as well as during "mealtimes, toileting" and for mobility (id.). Due to the nature of the student's diagnosis, the CSE determined that the student "require[d] a paraprofessional to support her" medical needs and "her

[56] The January 2018 annual educational report indicated that the student "will sometimes reach out to touch another child" (Parent Ex. G at p. 3).

learning environment throughout the day" (id.). Student also required door-to-door transportation services that including a wheelchair lift bus, and a barrier free environment (id.).

Thus, contrary to the parents' assertion, the March 2018 CSE had sufficient evaluative information obtained from a variety of sources regarding the student's needs in order to develop an appropriate IEP.

5. Cumulative Procedural Violations

According to the parents, the aforementioned procedural violations, either individually or cumulatively, constituted serious procedural violations that "excluded" the parents from the "process" and resulted in a failure to offer the student a FAPE.

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 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]).

However, 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]).

C. March 2018 IEP

1. Annual Goals

Generally, the parents argue that the district failed to establish whether the March 2018 IEP "addressed all areas of need" and included "sufficient goals concerning all areas of delay." More specifically, the parents contend that the district failed to establish whether the annual goals were "clear, measurable, sufficiently challenging, contained benchmarks and were consistent with the student's abilities and [S]tate standards." The parents also contend that the March 2018 IEP included only "three classroom goals," which were inadequate in light of the student's levels of need and skills deficits and which were "insufficiently challenging." Next, the parents assert that the eight annual goals pertaining to the student's related services "used the words 'increase' or 'improve' without any indication of starting benchmarks and/or measurable outcomes."[57] Finally,

[57] To the extent that the parents' reference to the absence of "starting benchmarks" means that the annual goals lacked baselines upon which to measure progress, the applicable State regulations cited above do not require "baseline" functioning levels to be included in annual goals in an IEP (R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *13 [S.D.N.Y. Sept. 27, 2013] [noting that with respect to drafting annual goals "[c]ontrary to Plaintiffs contention . . . . , nothing in the state or federal statute requires that an IEP contain 'baseline levels of functioning' from which progress can be measured]). Instead, the annual goals must meet a simpler criterion—which is the annual goal must be "measurable."

the parents argue that the evidence reflects that the March 2018 CSE did not consider the student's progress, or lack thereof, with respect to the annual goals from the previous school year in relation to the annual goals in the March 2018 IEP.

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]). Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]).[58]

At the impartial hearing, the district school psychologist testified that the annual goals in the March 2018 IEP were obtained from the "progress reports from the teacher, from the [OT], PT, and speech" (Tr. p. 165). A brief comparison of the annual goals and short-term objectives in the March 2018 IEP with the annual goals and short-term objectives in the December 2017 OT progress report, the December 2017 PT progress report, and the January 2018 speech-language progress report, generally corroborates this testimony and further reflects that the March 2018 CSE relied upon the most up-to-date information about the student's needs in creating the annual goals (compare Dist. Ex. 2 at pp. 5-8, with Parent Ex. D at p. 2, and Parent Ex. E at p. 4, and Parent Ex. F at pp. 3-4). With regard to the annual goals addressing the student's readiness skills, play skills, and ADL skills or self-help skills, the March 2018 CSE appeared to lift those annual goals directly from the student's July 2017 CPSE IEP, even though the prior written notice did not indicate that the CSE relied upon this document to develop the IEP (compare Dist. Ex. 2 at pp. 8-9, with Dist. Ex. 7 at p. 5, and Dist. Ex. 3 at p. 2).

In this case, the March 2018 IEP included approximately 11 annual goals with approximately 33 corresponding short-term objectives to address the student's identified needs in the areas of receptive and expressive language skills, play skills, oral motor and feeding skills, sensory processing and attention skills, fine and gross motor skills, cognitive skills, and ADL or

[58] State guidance describes short-term instructional objectives as the "intermediate knowledge and skills that must be learned in order for the student to reach the annual goal" ("Guide to Quality [IEP] Development and Implementation," at pp. 37-38, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). According to the same State guidance, short-term instructional objectives break down the skills or steps necessary for a student to accomplish an annual goal into discrete components (see id.). Benchmarks are described as "major milestones that the student will demonstrate that will lead to the annual goal;" benchmarks "usually designate a target time period for a behavior to occur" and generally establish "expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents" of progress toward the annual goals (id.). "Short-term instructional objectives and benchmarks should be general indicators of progress, not detailed instructional plans, that provide the basis to determine how well the student is progressing toward his or her annual goal and which serve as the basis for reporting to parents" (id.).

self-help skills (see Dist. Ex. 2 at pp. 5-9). A careful review of the annual goals reveals that, contrary to the parents' assertions and notwithstanding the use of terms such as "increase" or "improve," each annual goal included an evaluative criteria (i.e., 80 percent three out of four consecutive trials), an evaluation schedule (i.e., one time per month), and a procedure to evaluate the annual goals (i.e., provider observation charting and data collection, recorded class activities) (id.). In addition, the inclusion of short term objectives in this case cured any lack of specificity in the annual goals (id.; 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]). Notably, each short-term objective included its own evaluative criteria (i.e., 80 percent accuracy, four out of five trials (see Dist. Ex. 2 at pp. 5-9).

At the impartial hearing, the district school psychologist testified that the March 2018 CSE discussed the annual goals, although she could not recall whether the annual goals were discussed in English or Spanish (see Tr. pp. 112-14, 163). For example, she testified that the CSE discussed what the annual goals would be, how the annual goals would be used by providers (i.e., a speech-language therapy provider), and that the providers would "be able to provide a baseline data" in working with the student (see Tr. pp. 112-14). She further testified that the student's toileting needs, as well as her ADL needs, had been addressed in the annual goals for ADL or self-help skills (see Tr. pp. 96-98, 160-61; Dist. Ex. 2 at p. 9). With respect to whether the IEP included "anything" to assist the student in becoming "independent in going to the bathroom," the district school psychologist testified that the student was non-ambulatory and needed the "support of some assistance," which the paraprofessional would do (Tr. p. 98). And although the district school psychologist testified that the March 2018 IEP did not include any annual goals to address to improve the student's ability to attend and focus, a review of the IEP contradicts this testimony (see Tr. pp. 185-86). For example, the readiness skills annual goal worked on the student's ability to increase her eye contact and consistently turn her head toward a speaker, and the sensory processing annual goal directly targeted the student's ability to improve her attention for greater success in the classroom participation (compare Tr. pp. 185-86, with Dist. Ex. 2 at pp. 7-9).

Even assuming for the sake of argument that the goals were less than ideal and contained minor procedural defects, they sufficiently targeted the student's identified needs such that they would likely lead to educational progress and would not lead to a denial of a FAPE.

2. Consideration of Special Factors

a. Interfering Behaviors

The parents assert that the March 2018 CSE failed to conduct an FBA or develop a BIP. In addition, the parents argue that the March 2018 IEP failed to address the student's behaviors.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F.

Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S., 454 F. Supp. 2d at 149-50). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). 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]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

Based upon the evidence in the hearing record, it is undisputed that the March 2018 CSE did not conduct an FBA or develop a BIP (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III). However, as explained below, a review of the evaluative information available to the March 2019 CSE shows that the student did not exhibit behaviors that impeded her learning or that of others such that she required an FBA, or consequently, a BIP.[59]

[59] Additionally, in the memorandum of law, the parents argue, in part, that the March 2018 CSE should have conducted an FBA because the student had a BIP in place during the 2016-17 school year, dated March 2017 (see Parent Mem. of Law at p. 14; see Dist. Ex. 13). According to the March 2017 BIP, the student was referred for the BIP due to "her tendency to put her hands in her mouth and pull her hair, specifically when [a] teacher or therapist [was] attempting to work with her" (Dist. Ex. 13 at p. 1). The BIP also noted that the student put her "hands inside [her] mouth and pull[ed] her hair during therapy sessions and when novel activities [were] being introduced in the classroom" (id.). However, as explained previously, the evidence in the hearing record did not sufficiently establish that the March 2018 CSE relied upon the student's previous BIP in the development of the student's March 2018 IEP. Nevertheless, even if the March 2018 CSE had the previous BIP available to consider, the parents do not point to any legal authority standing for the proposition that the mere existence of a prior BIP requires a CSE to conduct either an FBA or develop a BIP. Rather, the CSE was required to make the determination regarding IEP program and services recommendations based on the results of the initial or most

At the impartial hearing, the district school psychologist testified that the district did not conduct an FBA in advance of the March 2018 CSE meeting, nor did the CSE have available to it an FBA conducted by "anybody" else (Tr. p. 88). She explained that if the March 2018 CSE had determined that it needed further information, it could have asked for an evaluation (see Tr. p. 90). Review of the evaluative information the CSE considered to develop the student's March 2018 IEP—discussed in detail above—showed that one report mentioned that the student wore bilateral elbow splints to prevent the mouthing of her hands (see Parent Ex. E at p. 3; see generally Parent Exs. D; F-G; Dist. Ex. 5). Regarding the student's behavior, the March 2018 IEP indicated that "repetitive self-stimulation behavior (fingers in her mouth) limit[ed] her progress at [that] time," although "[s]ince the introduction of elbow splints some of this behavior ha[d] decreased, helping [the student] to focus and attend to task for longer periods of time" (Dist. Ex. 2 at p. 1). The IEP also reflected that the student exhibited "generally poor" engagement, attention, and motivation; however, in addition to the use of elbow splints to decrease the student's mouthing behavior in order to improve her focus and attention, the present levels of performance in the March 2018 IEP indicated that, when provided with "physical cues and verbal prompting," the student could be redirected and that she required "verbal prompting and hand-over-hand assistance to help her stay motivated, focused, and participating in class activities" (id. at pp. 1-2, 4). The IEP further indicated that the student was "reliant on adult intervention to provide hand-over-hand assistance to keep her motivated, focused, and attending to task" (id. at pp. 2, 4).

Accordingly, the March 2018 CSE recommended strategies in the IEP to address the student's management needs, which included that the student would benefit from hand-over-hand assistance, physical prompts and cuing, verbal prompts, redirection to task, sensory stimulating activities, direct teacher assistance, and frequent check ins (see Dist. Ex. 2 at p. 4). The IEP provided an annual goal to improve the student's sensory processing in order to increase attention for greater success in her classroom participation, with short-term objectives including that the student would not bring her hands to her mouth or face for a five minute period of time after having been provided with sensory input and that she would attend to a table top activity for three minutes with less than two cues to stay on task and in her seat (id. at p. 7).[60] The March 2018 CSE also recommended that the student receive full-time, 1:1 paraprofessional services to support her needs in "her learning environment throughout the day" (id. at pp. 4, 11).

Therefore, a review of the hearing record does not provide a basis to conclude that, at the time of the March 2018 CSE meeting, the student was engaging in behaviors that impeded her learning such that the CSE was required to conduct an FBA, or develop a BIP, or that the absence of an FBA rose to the level of a denial of a FAPE. Rather, the evidence showed that the March 2018 CSE was aware of the student's mouthing behavior and limited attention and focus, and,

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]).

[60] In contrast, the district school psychologist testified at the impartial hearing that the March 2018 IEP did not include annual goals to "support improving [the student's] focus and attention" (Tr. pp. 185-86).

contrary to the parents' contention, recommended management strategies, annual goals, and paraprofessional services in the IEP to sufficiently address those needs.[61]

b. Assistive Technology

The parents assert that the March 2018 CSE did not consider conducting an assistive technology evaluation of the student despite evidence in the hearing record that the student was "non-verbal and using [assistive technology] in her current classroom."[62]

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

Based upon the evidence in the hearing record, it is undisputed that the March 2018 CSE did not consider conducting an assistive technology evaluation of the student or assistive technology to assist the student with communication (see Tr. pp. 106-08, 143). The district school psychologist testified that, in determining whether a student needed an assistive technology evaluation, "we look[ed] at what the student already ha[d]," "what the providers [were] working on . . . , and a determination of assistive technology will come, either by recommendation of the . . . speech therapists, or one of the related services providers" (Tr. pp. 143-44). She further testified that if the student required "technology that w[ould] help her access the information . . . or involvement in the classroom," then the CSE would have conducted a "full evaluation" (Tr. p. 144). In addition, she noted that related service providers could also use "any technology that they

[61] Although not dispositive, as it was information obtained subsequent to the March 2018 CSE meeting and during the impartial hearing proceedings, the hearing record contains an independent FBA (FBA IEE) conducted in July 2019 that identified target behaviors as the student "sucking on her hands and a towel" and her "failure to make eye contact" (Parent Ex. UU at p. 12). With regard to the mouthing behavior, the evaluator testified that the student put her hands in her mouth "in order for her to swallow" (Tr. pp. 504-05). Although the evaluator recommended various supports and services in the FBA IEE report, the evaluator did not recommend the development of a BIP at that time due to the student's lack of basic understanding "of the contingent relationship between behavior/consequence" and that "[t]he function of her hand and towel sucking was unclear" (Parent Ex. UU at p. 16).

[62] The parents' assertion that the student used assistive technology in her current classroom refers to the student's programmatic exposure to using "BIGmack" switches during the 2018-19 school year (Tr. pp. 279-80, 282-83, 298-99). At the impartial hearing, the school psychologist of the school-age program at ADAPT testified that all of the students in the classroom were exposed to using a "BIGmack switch" and that this student in particular "need[ed] some hand-over-hand assistance to get her started, to kind of lift her hands to do it" (Tr. pp. 298-300). But once the student did it, "she kind of enjoy[ed] hearing the sounds coming from it and [was] more willing to participate again and press it again" (Tr. p. 300). However, this information postdated the March 2018 CSE meeting, since the student began only began attending ADAPT's school-aged program in September 2018 (see Tr. p. 291).

would like to use" and the classroom had "smart boards" (Tr. p. 144). The district school psychologist also testified that an assistive technology evaluation had not been conducted in this instance "primarily because the speech-language therapist [did not] request one" (Tr. p. 145).

In this instance, the documents relied upon by the March 2018 CSE do not include any reference to either the need for an assistive technology evaluation or assistive technology services (see generally Parent Exs. D-G; Dist. Exs. 5). Instead, the documents relied upon reflect that the student was beginning to demonstrate some developmentally early cognitive and language skills; for example, the January 2018 speech-language progress report reflected that the student demonstrated receptive language skills estimated to range between 11 to 13 months of age (see Parent Ex. F at p. 2). Similarly, her expressive language skills were estimated to range between the 8 to 10 months of age (id.). At that time, the student "did not follow directions, identify objects, or respond to any form of questions" (id. at p. 3).

The January 2018 annual educational report indicated that the student worked on skills with the 1:1 paraprofessional, who often redirected the student's focus and attention (see Parent Ex. G at p. 1). At that time, the student could "keep a cause/effect toy on her tray while exploring the toy," and she could "push down on levers, turn knobs and open small latches/doors" (id.). In addition, the student was "beginning to make choices from a field of two and show[ed] preferences for certain toys and musical selections" (id.). The report also indicated that the student required "hand-over-hand assistance to help her stay motivated, focused and participating in class activities" (id.). However, the student did not "imitate simple motoric movements such as pointing, clasping or tapping" and was not "aware of colors, numbers, letters or shapes" (id. at p. 2). The student "mainly communicate[d] by smiling/crying," and she was "beginning" to turn her head towards "some simple actions such as a sound/light [or] rooster puppet opening its mouth and blowing a bubble wand" (id. at p. 2).

In light of the foregoing, it appears that, at the time of the March 2018 CSE meeting, the student had not yet developed the prerequisite skills to make assistive technology an essential element of an IEP for the student, such that the lack of an assistive technology evaluation and subsequent IEP recommendation for assistive technology did not rise to the level of a denial of a FAPE (see E.F. v Newport Mesa Unified Sch. Dist., 2015 WL 3867982, at *10 [C.D. Cal. June 23, 2015] [finding a district's delay in recommending assistive technology reasonable where the student's knowledge regarding communication with such devices was still emerging]). As the student progresses in her skills, I encourage the parties to revisit the issue of assistive technology in a CSE meeting. In the absence of a denial of a FAPE on this issue, I will reverse the IHO's order to provide the student with assistive technology services.

3. Pool Therapy

The parents assert that the district, and the IHO, failed to consider the student's need for pool therapy or therapeutic swimming.

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 PT and OT, 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]). State law defines physical therapy, in part, as the "evaluation, treatment or prevention of disability, injury, disease, or other condition of health using physical, chemical, and mechanical means including, but not limited to heat, cold, light, air, water, sound, electricity, massage, mobilization, and therapeutic exercise with or without the assistive devices" (Educ. Law § 6731[a]).

In support of the contention that the student required pool therapy provided at ADAPT, the parents point to the May 2018 letter written by a physical therapist, as well as testimonial evidence, which indicated that the student's preschool teacher spoke at the March 2018 CSE meeting about the therapeutic benefits of pool therapy, including strengthening and stretching the student's muscles (see Req. for Rev. ¶ 18; Parent Mem. of Law at pp. 16-17). According to the May 2018 letter, a physical therapist indicated that the student would "benefit immensely" from pool therapy, noting that the "buoyancy of the water w[ould] assist to improve her range of motion, muscle strength, and coordination" (Parent Ex. H).

As noted previously, it is undisputed that the parents and the preschool teacher expressed that the student had been receiving pool therapy at ADAPT during the March 2018 CSE meeting and a desire for it to continue (see Tr. pp. 415-16; 478-80; Dist. Ex. 2 at p. 17). With regard to pool therapy at ADAPT, the hearing record reflects that, in addition to the preschool students, the students in the school-aged program at ADAPT also had access to the pool (see Tr. p. 286). The preschool teacher testified that the student had access to the pool as soon as she began attending ADAPT, noting further that the pool was "for all the preschoolers" (Tr. p. 471). She also testified that she had explained to the March 2018 CSE the "absolute[] necessity" of the pool, especially with regard to reducing the student's anxiety and improving her ability to focus and attend to tasks in the classroom, as well as improving her ability to walk with a gait trainer (Tr. pp. 479-80). In describing the student during her first year in preschool beginning in September 2016, the preschool teacher testified that the student "was crying all day, all the time," and in attempting to understand the student's needs and to control her behavior, she and the staff tried a variety of strategies and activities, which included using the pool (see Tr. pp. 466-70). The preschool teacher testified that, at that time, the student "went in the pool as often as she could" and could focus for longer periods of time in the classroom after using the pool (Tr. pp. 470-71).

The school-aged students at ADAPT used the pool "two days of the week and each class [went] once—one day of the week" (Tr. p. 286; see Tr. pp. 352-53 [clarifying that school-aged students used the pool once per week for 30 minutes]). The evidence also reflects that, in the pool, the students wore life vests and "really just g[ot] to move around much more freely"—both in and out of the pool—because the warm water allowed the students' muscles to "relax" and "not be as stiff" (Tr. pp. 286-87; see Tr. pp. 333-35 [describing observations of the student using the pool during the 2018-19 school year]). Generally, students would be in the pool with a lifeguard and a staff member, such as a teacher or a teacher assistant (see Tr. p. 287). However, all of the foregoing evidence was elicited from the school psychologist of the school-aged program at ADAPT who testified at the impartial hearing and who did not attend the March 2018 CSE meeting; moreover, the hearing record contains no evidence that any of this information was available to, or presented to, the March 2018 CSE (see Tr. pp. 279-354; see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III).

At the impartial hearing, the district school psychologist testified that "ADAPT" recommended therapeutic swimming or pool therapy for the student and that the "physical therapist" at ADAPT made that recommendation (Tr. pp. 72-74). According to the district school psychologist, the recommendation was made to "stretch" the student's muscles, and she further testified that pool therapy was a "medical" program because PT required a prescription (Tr. p. 73). While acknowledging that PT, itself, assisted a student's functioning in the classroom, the district school psychologist testified that pool therapy was not something the student required to function within the classroom or to access the curriculum (Tr. pp. 73-74). In subsequent testimony, the district school psychologist responded affirmatively when asked whether the March 2018 CSE "had a letter of recommendation from [the student's] physical therapist" that spoke to pool therapy as improving the student's "range of motion, her muscle strength, and coordination" (Tr. pp. 178-79).

However, given that the May 2018 letter postdated the March 2018 CSE meeting by almost two months, the letter could not have been available to the March 2018 CSE, in direct contravention of the district school psychologist's testimony (compare Tr. pp. 178-79, with Dist. Ex. 2 at p. 15, and Parent Ex. H). In addition, the district school psychologist's testimony on this point is directly contravened by the contents of the March 2018 prior written notice, which did not list the May 2018 letter as a document relied upon by the CSE (compare Tr. pp. 178-79, with Dist. Ex. 3 at p. 2). Moreover, the student's use of the pool at ADAPT was not reflected—or recommended—in any of the evaluative information relied upon by the March 2018 CSE (see generally Parent Exs. D-G; Dist. Ex. 5).

The parents did not advance a specific argument on appeal in favor of aquatic pool therapy. In light of the foregoing, the evidence in the hearing record demonstrates that, while the March 2018 CSE was aware that the student may have benefitted from using the pool at ADAPT, the March 2018 CSE had no evaluative information to support recommending pool therapy as a necessary service that the student required in order to receive a FAPE (see generally Tr. pp. 1-570; Parent Exs. A-Z; AA-BB; DD-JJ; MM-UU; Dist. Exs. 1-19; IHO Exs. I-III). The only notation on the IEP was that the parent indicated concern that the pool therapy might not continue if the student were moved (Dist. Ex. 2 at p. 3), but I do not find that sufficient to conclude that the IEP was deficient, especially when the IEP contained PT, OT and the assistance of a 1:1 health paraprofessional to address her needs.[63]

D. Assigned Public School Site

Finally, the parents contend that the assigned public school site was not appropriate for the student because it did not offer the same services and accommodations available at ADAPT (i.e., padded room, Rifton chair, appropriate changing area, potty in the classroom) or a sensory gym. The parents also argue that disabled students were prohibited from using the playground at the

[63] Although not before the March 2018 CSE, and cannot be faulted for not considering it, even the PT provider at ADAPT later recommended that the student would "benefit immensely" from aquatic pool therapy, but the IDEA does not require immense benefit, which tends toward maximization of educational services. It's also obvious that this issue is also tied to the fact that the public school site to which the district would assign the student did not have a pool. The parent argues in her request for review that the district has a "higher burden to establish why a child should be moved," but cite no authority for that proposition. That is because it is not true. The district has to show that the proposed programing was reasonably calculated to enable the student to receive educational benefit in light of her circumstances, a more modest standard.

assigned public school site. Additionally, the parents argue that district failed to establish the functional grouping of the proposed classroom or that the assigned public school site could implement the management needs in the March 2018 IEP. The parents also assert that the assigned public school site was not appropriate because it was "too far from [their] home."[64]

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[65] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL

[64] Technically, the distance of the assigned public school site from the parents' home is more accurately identified as an LRE concern. In this instance, the student's father testified that the assigned public school site was approximately nine miles from their home (see Tr. pp. 447, 451).

[65] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Although review of the parents' claim that the assigned public school site was incapable of implementing the student's program shows that it is not tethered to any specific mandate in the March 2018 IEP, review of the evidence in the hearing record does not support even a general claim regarding the district's ability to implement the IEP.

At the impartial hearing, the student's father testified about the visit to the assigned public school site (see 447-53). He testified that the second floor hallway was "narrow" and "not really comfortable," noting additionally that it was "not wide enough for people to walk by and especially children[] with wheelchair[s]" (Tr. p. 448). He also testified that he heard "screaming," which he attributed to "misbehaving" students and thought it was "inappropriate" (Tr. pp. 448-49). With respect to the classrooms observed, the student's father noted that they were "not padded" and had "small chairs" and what he considered to be a "regular small table with chairs" (Tr. pp. 449-50). During the visit, the student's father asked about a Rifton chair—as he did not recall seeing any—and he was told that the student would be provided with a Rifton chair "whenever it was necessary" (Tr. pp. 449-50). The student's father also asked about the "infirmary," which, according to him, "was not equipped for any emergency" (Tr. p. 450). The student's father also testified that the "changing station" was "separate" and "not well equipped" because there were "no changing papers or anything" (Tr. p. 250). As final points, the student's father testified that the elevator at the assigned public school site was "very small," he did not see a playground, and there was no pool (Tr. pp. 452-53).

At the impartial hearing, the district presented the site supervisor of the assigned public school site as a witness (see Tr. pp. 209-70; see generally Dist. Ex. 4). The site supervisor testified that she had a master's degree in special education and was licensed in special education (see Tr. pp. 209-10). She was familiar with the student in this case by virtue of reviewing her "paperwork," and specifically identified the March 2018 IEP (Tr. pp. 211-12). According to the site supervisor, the assigned public school site offered five 12:1+4 special class placements (one class each starting with kindergarten), with students aged 4 through 11, all located on the second floor of the building (see Tr. pp. 214-15; see also Tr. pp. 220-22 [explaining that the special education unit was "housed in a regular community school"]; Tr. pp. 244-47 [estimating the size of the elevator as six feet long by three or four feet wide and describing safety protocols]). The site supervisor also testified that the classrooms had "accessible wheelchair desks," "student-size chairs," "regular desks that the chairs slide under," "bookshelves," "cubbies," and a "teacher's desk" (Tr. pp. 249-50). Every classroom was also equipped with a "SMART board mounted on the wall," cabinets and windows (Tr. p. 249). In addition, "sections" of the classroom had "matted" floors for "yoga time and stretch time," but otherwise had tile floors (Tr. p. 250). She also confirmed that the assigned public school site could provide the student with the related services of PT, OT, and speech-language therapy, as well as the services of a 1:1 paraprofessional, as recommended in the March 2018 IEP (see Tr. pp. 215-16; see also Tr. pp. 222-37, 244-50 [describing the layout of the school building, as well as spaces for related services, implementation of related services, and the number of related services' providers]). According to the site supervisor, although the special education students did

not have a designated playground or "outside space," the assigned public school site did have a playground and a separate gym (Tr. pp. 233-34, 263). The assigned public school site also had three "licensed and trained nurses" available Monday through Friday, with both a nurses' office and an infirmary adjacent to the office (Tr. pp. 250, 264-65). The site supervisor testified that the assigned public school site could provide the student with all of the mandates in her IEP, based upon a review of the student's IEP (see Tr. pp. 216, 238-40).

With respect to the functional grouping of students in the 12:1+4 special classes, the site supervisor testified that this student, in particular, could have been placed in "two classes" at the assigned public school site (Tr. pp. 253-57; see Tr. pp. 261-62 [clarifying that the "school ha[d] the liberty of selecting an actual physical room" after the student had been assigned to that school site by the placement office]).[66] She explained that the specific classroom assignment would be based on the student's age, so the student in this case would have entered the "kindergarten Turning-5 class" (Tr. pp. 256-57). The site supervisor clarified that she initially thought of two classrooms the student could attend, but only because "many times as the classes fill up, [she] ha[d] to go to the next grade up"—for example, if the kindergarten class was full, then the site supervisor would have to put the student in a "combination of kindergarten through [first] grade class" (Tr. pp. 257-58). Thereafter, "every class ha[d] three instructional groups, high medium, and low," and the student would then be put into an instructional group based upon "all the assessments" done at the assigned public school site upon the student's arrival (Tr. p. 258). According to the site supervisor, a typical day in a 12:1+4 special class (eight periods per day) included instruction following the curriculum for English language arts (ELA), mathematics, social studies, and science and that the "actual content [was] tailored to the students' levels of instruction" (Tr. p. 266). She explained that the classroom teacher began instruction as a whole group, and then for "[e]very lesson" there would be a "smaller group period" of instruction with the students broken down into the "high, medium, and low" groups, with the teacher facilitating between the smaller groups and with the paraprofessionals in the classroom providing "most of the actual, tangible hand-over-hand" assistance (Tr. p. 266). Each period of instruction lasted 50

[66] Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

minutes (see Tr. p. 267). In addition, the students would return to whole group instruction for the final 10 to 15 minutes of the period to share and talk (see Tr. p. 267).

Next, site supervisor testified that the "management needs and the level of support" for students within the 12:1+4 special class placements was "very in-depth" and "high," which was why those classrooms were "well-staffed" (Tr. pp. 259-60). Turning the ADL skills of the students within the 12:1+4 special classes, the site supervisor testified that very few of the students "actually [ate] whole food"; instead, most of the students ate "puree or [were] tube-fed" (Tr. p. 260). The site supervisor also testified that although the assigned public school site had a cafeteria, the students in the 12:1+4 special classes did not eat any meals in the cafeteria; instead, the meals were brought up to the classroom for both breakfast and lunch—noting that the only time the students left the classroom was for dismissal and gym (see Tr. pp. 263-64). She also testified that "[v]ery few" used the bathroom independently or communicated verbally, noting that most of the students were "nonverbal" (Tr. pp. 260-61). The assigned public school site had two male restrooms and two female restrooms—and each restroom had a changing table—located outside the classroom, and students would be changed in those restrooms (see Tr. p. 269). Socially, many of the students in the 12:1+4 special classes could smile or laugh, but each student's ability to show emotion varied from student to student (see Tr. p. 261).

As noted above, permissible prospective challenges must be "'tethered' to actual mandates in the student's IEP" (Y.F., 659 Fed. App'x at 5); the parents "must allege that the school is 'factually incapable' of implementing the IEP" to be considered "more than speculation" (see, e.g., M.E., 2018 WL 582601, at *12); and such challenges "must be based on something more than the parents' speculative 'personal belief' that the assigned public school site was not appropriate" (see, e.g., K.F., 2016 WL 3981370, at *13). Given these parameters, the parents' alleged violations related to the assigned public school site and functional grouping do not fall within the permissible prospective challenges to a district's capacity to implement the March 2018 IEP, as the issues are neither tethered to actual mandates in the IEP, nor do the issues rise to "more than speculation" that the district was factually incapable of implementing the March 2018 IEP.

VII. Conclusion

For reasons set forth above, the IHO's ultimate conclusion regarding the 2017-18 school year must be vacated in light of the unaddressed issues and this matter is remanded to the IHO to carefully identify the fact issues in dispute between the parties regarding the 2017-18 school year, to further develop the hearing record if deemed necessary, and to make determinations as to whether the district offered the student a FAPE for the 2017-18 school year based upon the issues to be resolved.[67] Having determined that the district did not fail to offered the student a FAPE in the LRE for the 2018-19 school year, the inquiry for that school year is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

[67] It is anticipated that unless the parties agree on another arrangement, the student will continue to attend ADAPT pursuant to stay put while the proceeding is pending.

IT IS ORDERED that the decision of the IHO dated October 9, 2020 is modified by reversing that portion which ordered the district to provide the student with assistive technology services; and

IT IS FURTHER ORDERED that the decision of the IHO dated October 9, 2020 is modified by vacating that that portion which determined that the district offered the student a FAPE for the 2017-18 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings consistent with the body of this decision; and

IT IS FURTHER ORDERED that in the event the IHO is no longer hearing cases, the district shall appoint a new IHO in accordance with the rotational selection procedure and State regulations.

Dated: **Albany, New York**
January 14, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER