The University of the State of New York

The State Education Department
State Review Officer
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No. 21-085

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the North Rockland Central School District**

**Appearances:**
The Cuddy Law Firm, PLLC, attorneys for petitioner, by Mark Gutman, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Neelanjan Choudhury, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational programs and related services the respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2017-18, 2018-19, and 2019-20 school years were appropriate. The appeal must be dismissed.

### II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

The student was previously a resident of the East Ramapo School District at the beginning of the 2016-17 school year (fourth grade), and he was attending a 12-month 8:1+2 special class at Rockland Board of Cooperative Educational Services (BOCES), the Jesse Kaplan School (the Kaplan School), with related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Ex. 1 at pp. 1, 13-14, 16). During that school year, the student moved and was thereafter enrolled as a resident of the district, North Rockland Central School District, in

February 2017 (Dist. Ex. 2 at p. 2).[1, 2] The district convened a CSE on March 2, 2017, which decided to adopt the student's IEP created by East Ramapo (see Dist. Ex. 3 at p. 1; compare Dist. Ex. 1, with Dist. Ex. 3). Specifically, the CSE continued to recommend that the student be placed in a 12-month, 8:1+2 special class at the Kaplan School (Dist. Ex. 3 at pp. 1, 15-16, 18). In addition, the CSE continued to recommend that the student receive related services of speech-language therapy, OT, and PT (id. at p. 15).

The CSE convened on April 28, 2017 to revise the student's IEP for the 2017-18 school year, fifth grade (Dist. Ex. 4 at p. 1).[3] Available for its review were the reports and evaluation conducted by the Kaplan School in February 2017 (see Dist. Ex. 4 at p. 5). The CSE recommended that the student be placed in an 8:1+2 special class with related services of one 30-minute individual session of speech-language therapy per week, two 30-minute small group sessions of speech-language therapy per week, two 30-minute individual sessions of OT per week, and one 30-minute session of PT per week (id. at p. 17).[4] The CSE also recommended supplementary aids and services of refocusing and redirection and a positive reinforcement plan (id. at p. 18). Access to an augmentative communication device throughout the school day and throughout the school environment was also recommended (id.).[5] The CSE recommended that the student be provided with special transportation that consisted of a small school bus or vehicle with an aide (id. at p. 20). The CSE also recommended a 12-month program consisting of placement in the 8:1+2 special class, small group speech-language therapy and individual OT during the summer (id.). The IEP identified the Kaplan School as the site of the student's programming (id. at pp. 18-20).

In a prior written notice dated December 18, 2017, the district requested parental consent to conduct a reevaluation of the student (Dist. Ex. 35 at p. 1). As part of the reevaluation, the district sought to conduct a psychological evaluation, educational evaluation, social history update, teacher reports, physical examination, classroom observation, speech-language evaluation, OT

[1] A home language questionnaire also dated February 28, 2017 indicated that the student understood Creole and that he understood English very well but spoke and wrote English "only a little" (Dist. Ex. 33).

[2] On February 15, 2017, the Kaplan School created an educational report that described the student's present levels of performance with respect to academics, speech-language development, activities of daily living (ADLs), social development, and management needs (Parent Ex. H). The Kaplan School also generated an OT evaluation and PT annual report dated February 16, 2017 and a communication plan and speech-language annual report dated February 27, 2017 (Parent Exs. I, J, K, L). The reports identified the student's district as North Rockland (Parent Exs. H, I, J, K).

[3] The April 28, 2017 prior written notice indicated that the district recommended that the student continue to receive special education services (Parent Ex. BB; Dist. Ex. 34 at p. 1). The prior written notice further indicated that the only other program considered by the district was a general education program without supports or related services, which was rejected due to the student's "current functioning levels and skills"(Parent Ex. BB; Dist. Ex. 34 at p. 1).

[4] The CSE recommended that all of the student's related services be provided in a "flexible setting" (Dist. Ex. 4 at pp. 1, 17).

[5] The IEP indicated that the student required an assistive technology device and/or service and that the CSE recommended the device be used in the student's home (Dist. Ex. 4 at p. 13).

evaluation, PT evaluation, and assistive technology evaluation (id. at pp. 1-2). The parent provided written consent for the proposed reevaluation on January 24, 2018 (Parent Ex. DD).

According to a January 11, 2018 "bus conduct report" completed by the student's school bus aide, the student's book bag was taken away on the bus because he started to take things out and throw them (Parent Ex. G at p. 1-2).[6] After his bag was taken away, the student reportedly kicked, hit, pushed and knocked the glasses off the driver and behaved similarly toward the bus aide (id. at p. 2). The report also indicated that the bus staff was starting to notice that if the student did not get his way, he would scream, bite, or hit (id.).

The student was reevaluated by the district in the winter and spring of 2018. The district conducted a psychological evaluation, an educational reevaluation, an OT reevaluation, a PT "annual review report," and a speech-language reevaluation (see Dist. Exs. 5; 6; 7; 8; 9). A February 2018 classroom observation was also conducted (see Parent Ex. M).

The CSE convened on May 18, 2018 to revise the student's IEP for the 2018-19 school year (Dist. Ex. 10 at p. 1). The IEP indicated that the CSE had the following documents: the April 2018 speech-language report, an April 2018 educational evaluation, an April 2018 OT evaluation, a February 2018 classroom observation, a February 2018 psychological evaluation, an April 2018 PT progress summary, and a 2018 attendance record (id. at p. 4). According to the IEP, the student needed strategies, such as positive behavioral interventions and supports, but did not require a behavioral intervention plan (BIP) (id. at p. 11). In addition, the IEP noted that the student needed an assistive technology device, and that the device was recommended to be used in the student's home (id. at p. 12). The CSE recommended 12-month services in an 8:1+2 special class at the Kaplan School (id. at pp. 16-18). The CSE also recommended that the student receive related services of two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-minute sessions of individual PT per week (id. at p. 16). For assistive technology, the CSE recommended daily access to an augmentative communication device throughout the school day (id.).

According to a June 22, 2018 prior written notice, the CSE recommended that the student continue to receive special education services and that the CSE considered a less restrictive settings, including more time within a general education setting, but that the other options were rejected due to the student's current functioning levels and skills (Parent Ex. CC).[7]

In a letter dated October 19, 2018, the student's mother requested that the district conduct an assistive technology evaluation (Dist. Ex. 11). The parent indicated that she requested the evaluation because it was difficult for the student to communicate and she believed an evaluation for augmentative communication would be a "big help" and help create less frustration for all (id.).

A prior written notice dated October 22, 2018 indicated that the CSE was seeking to conduct an assistive technology evaluation and that the "special evaluation ha[d] been requested

[6] There was also an incident report from another incident on the school bus that occurred on July 26, 2016 (Parent Ex. F).

[7] The date the CSE met was not reflected on the prior written notice (Parent Ex. CC).

by [the student's] teacher and/or educational team" (Dist. Ex. 12 at p. 1). An assistive technology evaluation report dated December 20, 2018 indicated that the evaluation was conducted on October 26, 2018 and December 13, 2018 (Dist. Ex. 13 at p. 1).

In February 2019, the student's teacher at the Kaplan School prepared an educational report (see Dist. Ex. 14). Also, annual reports for speech-language therapy and OT were prepared by the student's providers on March 4, 2019 (see Dist. Exs. 15; 16).

The CSE convened on April 3, 2019 to revise the student's IEP for the 2019-20 school year (Dist. Ex. 17 at p. 1). Again, the IEP indicated that the student needed strategies, such as positive behavioral interventions and supports, but did not require a BIP (id. at p. 13). Also, the IEP noted that the student needed an assistive technology device, and that the device was not recommended to be used in the student's home (id.). The CSE continued its recommendation that the student be placed in a 12-month, 8:1+2 special class at the Kaplan School (id. at p. 17-18, 20). For related services, the CSE recommended two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, one 30-minute session of individual PT per week, and one 30-minute session of parent training and counseling per month (id. at p. 17). Further, the CSE recommended access to an augmentative communication device daily throughout the day and recommended a speech-language consultation to continue to program the assistive technology device (id. at pp. 17-18).[8]

A prior written notice dated June 12, 2019 indicated that the CSE recommended that the student continue to receive special education services (Dist. Ex. 36 at p. 1). As with previous IEPs, the prior written notice indicated that the CSE considered programs and/or services that were less restrictive, with more time in the general education setting, but they were rejected due to the student's current functioning levels and skills (id.).

In a letter dated September 13, 2019, the parent requested that the district fund independent educational evaluations (IEEs) as she disagreed with the 2018 evaluations, asserting that they lacked sufficient standardized assessment and recommendations necessary to implement appropriate services for the student (Parent Ex. EE at p. 1). Specifically, the parent noted the lack of recommendations in the OT and PT reports and that the speech-language evaluation indicated that the student was non-verbal but did not state how to help the student progress (id.). Further, the parent noted that she "disagreed with the district's failure to conduct an assistive technology and neuropsychological evaluation" (id.). The parent requested district funding of the following IEEs: a neuropsychological evaluation, speech-language evaluation, an assistive technology evaluation, an OT evaluation, a PT evaluation, a functional behavior assessment (FBA), and a BIP if necessary (id. at pp. 1-2). For each evaluation requested, the parent indicated a provider that they wished to conduct the evaluation and the rates for those evaluations by their preferred provider (id.).

The CSE convened on October 2, 2019 to review previously completed testing and to discuss the parent's request for IEEs (Parent Ex. E at p. 1). The parent formally requested IEEs as

[8] The speech-language consultation was recommended for both the 10-month and 12-month school year (ESY) (Dist. Ex. 17 at pp. 17-18). For the 10-month school year, the service was recommended for one 30-minute session per week (Dist. Ex. 17 at p. 18).

she expressed concern regarding previous testing that in her opinion was not a fair representation of the student's abilities (id.). The district personnel at the CSE indicated that they believed the testing was a fair representation, but that they would follow up with the parent regarding the process to obtain IEEs (id. at pp. 1-2). No changes were made to the student's educational program and the parent indicated that she was in agreement with the placement at this time (id. at p. 2).

**A. Due Process Complaint Notice**

By due process complaint notice dated November 19, 2019, the parent alleged that the district denied the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years (Dist. Ex. 18 at p. 1).

The parent asserted that the district failed to provide prior written notice "sufficient to provide the[ parents] with due process" as the prior written notices provided following the 2017, 2018, and 2019 CSE meetings "failed to inform the parents of any of the specific records used as a basis for their proposed actions" (Dist. Ex. 18 at p. 5).

The parent asserted that the district failed to comprehensively evaluate the student because during the 2018 reevaluation, the district failed to conduct a speech-language and a PT evaluation despite the student's "significant communication issues and delayed gross motor development" (Dist. Ex. 18 at p. 4). Finally, regarding evaluations, the parent contended that she never received the assistive technology evaluation, which was allegedly conducted per the most recent IEP, and therefore the district failed to provide the parent with "a report of such an evaluation with a comprehensive assessment of how an [assistive technology] device could assist the Student with his communication" (id.).

Next, the parent argued that the district failed to develop meaningful and measurable goals that addressed all of the student's needs and that the goals were "repeatedly listed vague and unmeasurable goals on the Student's IEP" (Dist. Ex. 18 at p. 6). Regarding the student's behavioral needs, the parent asserted that the district had not conducted an FBA of the student since 2015 and, therefore, failed to "gain a comprehensive understanding of the Student's behavioral needs" (id. at pp. 4, 5). The parent also alleged that the district "repeatedly failed to develop a BIP for the Student year after year" (id.).

The parent contended that, for all the school years at issue, the recommended 8:1+2 special class was not an appropriate placement for the student in that it was not been "equipped to meet his needs" and the student had not made appropriate progress (Dist. Ex. 18 at p. 5).[9] The parent argued that the district failed to consider another educational setting for the student that would more appropriately address the student's needs (id.). The parent also argued the district failed to recommend appropriate related services for the student as the recommendations for speech-language, PT, and OT were not sufficient (id. at p. 6). The parent contended that the district reduced speech-language therapy services despite the student's significant needs; only recommended two 30-minute sessions per week of OT despite the student's struggle to make

[9] The parent also asserted that the 8:1+2 special class placement did not utilize research-based interventions (Dist. Ex. 18 at p. 5).

progress; and failed to recommend more than one 30-minute session of PT per week despite the student's low safety awareness and limited muscle tone (id.).

In addition, the parent alleged that the district failed to provide the student with an appropriate assistive technology device and training to use such a device (Dist. Ex. 18 at p. 6). Further, the parent argued that the student was not properly trained on the device that he utilized in school and that the IEP did not recommend the device for home use, thereby limiting his "ability to effectively use the device and consistently have a mechanism to express himself" (id.). Moreover, the parent asserted that she had not received any training on how to use or support the student with his device (id.).

Finally, the parent argued that the district failed to appropriately respond to their request for IEEs as the district did not request an impartial hearing and did not ensure that the evaluations were provided (Dist. Ex. 18 at p. 4).

As relief, the parent requested that the district be required to fund IEEs (Dist. Ex. 18 at p. 7).[10] In addition, the parent requested that a CSE be required to convene following the completion of the IEEs and to make recommendations based on the IEEs, including if the IEEs deem "it necessary," that the district locate "an appropriate placement for the Student in an approved non-public school" or, alternatively, that the district "defer the Student to be placed in a non-approved private school" (id.). The parent sought compensatory education services consisting of speech-language therapy, OT, and PT to be delivered by independent providers of the parent's choosing at their normal and customary rates (id.). The parent also requested that the IHO order assistive technology training for both the student and the parent, that the district provide appropriate prior written notices, that the district provide a Creole interpreter, and "any further relief the IHO may deem just and proper" (id. at p. 8).

### B. Facts Subsequent to Due Process Complaint Notice

The first impartial hearing date was held on December 19, 2019 (see Tr. pp. 1-32). The district requested clarification regarding the parent's requested relief and the parent attorney indicated that they needed the requested IEEs to be approved (Tr. pp. 6, 9, 11). The district indicated that the IEEs would be approved but that the school board had to vote on the issue and the parent requested the IHO issue an interim order granting the requested IEEs (Tr. pp. 21-22). The IHO held that the district granting the IEEs pending board approval was reasonable (Tr. p. 27).

On January 27, 2020, the Kaplan School physical therapist completed a recommendation sheet (Dist. Ex. 20). The physical therapist recommended that the student graduate from PT (id.). The justification provided was that the student was able to ambulate independently in the school and perform all functional transfers independently and safely (id.). Further, the recommendation indicated that the student had no needs at this time as the student was able to functionally participate in his education and was not limited in his access to any educationally based activities

[10] The parent requested a neuropsychological evaluation, a speech-language evaluation, an assistive technology evaluation, an OT evaluation, a PT evaluation, and an FBA with a BIP if necessary (Dist. Ex. 18 at p. 7). For each requested IEE, the parent identified the proposed evaluator and the cost of the evaluation (id.).

in the school setting (id.). The provider indicated that she spoke with the student's mother and sister and that the information was explained and appeared well understood (id.).

At the next impartial hearing held on January 31, 2020, the parties again discussed IEEs (see Tr. pp. 33-65). The district indicated that it had approved all the requested IEEs by the providers and at the rates requested (Tr. p. 58).

Three more impartial hearing dates were held on February 27, 2020, April 27, 2020, and May 22, 2020 (see Tr. pp. 71-155). At the February 2020 hearing, the parent's attorney indicated that most of the IEEs had been scheduled and they were working out the others, and as such, all of the IEEs should be completed by the end of March 2020 (Tr. p. 73). At the April 2020 hearing, the parent's attorney indicated that the IEEs that were able to be completed were done, but that due to the ongoing COVID-19 pandemic, the FBA was not able to be completed; and that they still wished to proceed with the impartial hearing (Tr. pp. 109, 113, 117-18). The district indicated that they had yet to see any of the IEEs and once they were received, the district was going to convene a CSE to review the evaluations (Tr. pp. 110-11). At the May 2020 hearing, the parent formally withdrew their request from the due process complaint notice for a new CSE meeting and objected to delaying the hearing any longer for a new CSE to convene as the new CSE would be outside the scope of the hearing (Tr. pp. 139-41). The IHO indicated that holding a CSE would be the next logical step and held that the CSE should convene as it was possible a new CSE could give conclusion to the case or have bearing on the case (Tr. pp. 140, 144, 150).

The IEEs obtained by the parent were entered into the hearing record, these IEEs included a March 4, 2020 OT evaluation, a March 10, 2020 assistive technology evaluation, a March 13, 2020 PT evaluation, a March 20, 2020 speech-language evaluation, and a March 21, 2020 neuropsychological evaluation (Dist. Exs. 21-25).

The district convened a CSE on June 1, 2020 to create a program for the 2020-21 school year (Dist. Ex. 31 at p. 1).[11] The IEP indicated that the district reviewed all of the IEEs obtained by the parent as well as updated progress reports (id. at p. 6). The IEP indicated that the student required strategies to address behaviors that impeded his learning, but that he did not require a BIP (id. at p. 15). Additionally, the IEP reflected that the student required an assistive technology device, which the CSE recommended be used in the home (id.). The CSE recommended a 12-month, 8:1+2 special class placement at the Kaplan School (id. at pp. 19-21, 23). For related services, the CSE recommended two 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-minute session of parent

[11] The June 1, 2020 CSE ended before the meeting was finished because the parent had to leave; however, the CSE reconvened on June 11, 2020 and recommendations were completed (Dist. Exs. 30 at p. 3; 31 at p. 2). Ultimately, the IEP was dated June 1, 2020 (see Dist. Ex. 31).

training and counseling per month (id. at p. 19).[12] Access to an augmentative communication device was recommended daily throughout the school day (id. at p. 20).[13]

### C. Impartial Hearing Officer Decision

On June 30, 2020, the parties began the substantive portion of the impartial hearing, which took place over seven hearing dates and concluded on December 22, 2020 (Tr. pp. 159-1384).

The IHO issued a decision dated February 24, 2021 that was two pages long including a cover page (see IHO Decision).[14] The IHO noted the "professional cooperation and coordination of all participants" at the impartial hearing and indicated that "only after being an active participant observer in the hearing and subsequent review of the record was it possible to promulgate the decision" (id. at p. 2). The IHO then held that the "record confirm[ed] that the student was placed in an academic environment which allowed him to progress with peers in a communication/socialization based focus" (id.). Further, the IHO found that the student made progress from 2017 to 2020 at the Kaplan School in most of the goals outlined on his IEPs and that the "design of the program as 'push in' encouraged specialty sharing and generalization with school and ancillary personnel" (id.). The IHO determined that the IEPs were completed in a timely manner and "reviewed at the scheduled committee meetings" (id.). Lastly, the IHO indicated that the IEEs were reviewed in a timely manner as required by State "procedural standards" (id.).

The IHO made four specific findings. First, he found "FAPE in [the least restrictive environment] was provided" (IHO Decision at p. 2). Second, the IHO held that, since the Kaplan School had "credentialed professionals," it should conduct an FBA of the student, upon which it could be determined whether the student required a BIP (id.). Third, the IHO directed that an "assistive technology device . . . be available for the student while in school and at home" (id.). Fourth, the IHO "highly recommended" the provision of parent counseling and training "coordinated by the school district" (id.).

[12] The CSE also recommended supplementary aids of: refocusing and redirection; positive reinforcement plan; additional time to process verbal information; check for understanding; direction present in clear concise manner; directions or prompts repeated; and directions/instructions paired with visual models or visual cues (Dist. Ex. 31 at pp. 19-20).

[13] The CSE recommend support for school personnel of: training and implementation support from technology department three times weekly; weekly speech-language consultation during the summer (ESY) and 10-month school year; and yearly training and implementation support from the technology department to review and set up the assistive technology device (Dist. Ex. 31 at pp. 20-21).

[14] The IHO decision is not paginated, but for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO Decision at pp. 1-2).

## IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in finding that the district offered the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years. The parent raised three specific complaints in the request for review.

The parent's first complaint was that the IHO "failed to perform his duty" throughout the hearing and in rendering his decision. The parent asserts that were several instances where the IHO did not understand the status of the case, the evidence, the legal arguments or the legal standards. Specifically, the parent pointed to the IHO's findings regarding the IEEs and delaying the start of the hearing. Further, the parent points to instances in the record where, she asserts, the IHO was not paying attention or indicated that he was not engaged in the hearings, including instances where the IHO stood up and walked away from his computer during the tele-hearings. Lastly, regarding the IHO's conduct, the parent argues that the IHO decision did "not address any arguments made by either side," failed to include an exhibit list, and "failed to advise the Parent of her right to obtain review of the decision." The parent requests that the IHO's decision be given no deference as he failed "to perform his role as an impartial hearing officer."

Next, the parent argues that the IHO erred by finding that the district offered the student a FAPE for the three school years in question. The parent contends that the district witnesses "were evasive, failed to recall crucial facts, lacked expertise to form accurate opinions as to [the student's] educational program, and presented contradictory testimony." The parent asserts that she presented four expert witnesses, who all testified that the student's educational program and services, including the student's placement, were not appropriate.

The parent argues that the district wholly failed to address her claim that it did not provide her with appropriate prior written notices that explained "what the CSE used as a basis for their proposed actions" and did not address its failure to appropriately respond to the parent's request for IEEs. The parent also asserts that she presented evidence to demonstrate that the student required an FBA. With regard to the "setting" that the student attended, the parent notes that the evidence showed that it did not provide enough support for the student to make meaningful progress and that the related services of speech-language therapy and OT were insufficient. The parent notes that the district improperly discounted the IEEs but failed to present any evidence that the IEEs "lacked quality. Also, the parent alleges that the district failed to appropriately provide the student with at home assistive technology for the 2017-18 and 2018-19 school years, while for the 2019-20 school year, the district did not provide the student with the appropriate device.

Finally, the parent contends that the district "impermissibly shift[ed] the burden" to the parent throughout the hearing, which "prejudiced the IHO against the Parent." For example, the parent asserts that the district questioned witnesses as to whether the parent ever requested changes or offered suggestions to the CSE, implying to the IHO that the parent had a duty to offer suggestions for an appropriate placement. Moreover, the district, in its closing brief, stated that the parent failed to testify, which "implie[d] . . . an obligation by the Parents, or a deficiency in the case despite the burden resting only on the District."

For relief related to the district's alleged failure to provide the student with a FAPE for the 2017-18, 2018-19, and 2019-20 school years, the parent requests that the district be required fund

the student's tuition at the Shrub Oak International School (Shrub Oak) for the 2020-21 school year and prospectively fund the tuition for the 2021-22 school year. Additionally, the parent requests that the CSE be required to create an IEP for the student to include: individual OT three times per week; individual speech-language therapy four times per week; individual PT two times per week; reading instruction by a certified Orton-Gillingham specialist for sixty minutes per week; and the exact assistive technology device as recommended by the independent assistive technology evaluation. The parent also requests the following compensatory education services: 69 hours of assistive technology training; 184 hours of speech-language therapy; 44 hours of PT; 184 hours of OT; 440 hours of tutoring; and 88 hours of parent counseling and training.[15] Lastly, the parent requests that the district be required to fund an FBA and a BIP.[16]

In its answer, the district generally admits or denies the parent's allegations and argues that the IHO's decision should be upheld in its entirety. In addition, the district contends that several of the parent's arguments do not provide sufficient citations to the hearing record. To the extent that the parent seeks prospective tuition, the district argues that the parent has the burden of proof under Burlington/Carter on the issue of the appropriateness of a unilateral placement and that she failed to meet that burden. Further, the district asserts that the parent filed a subsequent due process complaint notice seeking tuition reimbursement for the 2020-21 school year and should be precluded from seeking the same relief in the present matter. Finally, the district asserts that the parent did not assert in her request for review that the IHO erred in denying her "eleventh hour request" for tuition reimbursement. Regarding the parent's request to order the CSE to make specific recommendations, the district argues that the request for review does not allege why the student's needs the specified services. Finally, the district asserts that it has agreed to the parent's request for district funding of an independent FBA and BIP "at rates previously agreed to during the impartial hearing" and that, therefore, this portion of the parent's demand for relief is moot.[17]

## 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.

[15] The parent requests that the compensatory education services be delivered "by providers "of the parent's choosing at specified rates."

[16] Regarding the FBA and the BIP, the parent requests both be conducted by a provider of her choosing and specified rates.

[17] During the impartial hearing, the district agreed to fund the independent FBA and BIP requested by the parent (Tr. p. 58). However, the parent's chosen evaluator could not complete the FBA prior the commencement of the substantive portion of the impartial hearing due to challenges related to the COVID-19 pandemic (Tr. p. 109). There is no indication in the hearing record that the parent has attempted to obtain the FBA and BIP since the conclusion of the impartial hearing, that she is unable to do so, or that the district is refusing to pay. Rather, the district continues to acknowledge that it has agreed to fund the independent FBA and BIP (Answer at p. 7). As the parties appear to be in agreement regarding the IEE, it is unnecessary to address the parent's request for an independent FBA and BIP.

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]).

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

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

## VI. Discussion

### A. Preliminary Matters

#### 1. Compliance with Practice Regulations

Before turning to the merits of the parent's appeal, it is necessary to examine the sufficiency of the request for review.

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.). Section 279.8 requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) 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; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

Here, the request for review fails to comply with the form requirements of Part 279 of State regulations. In particular, the practice regulations require that each issue [be] numbered and set forth separately . . . identifying the precise rulings, failures to rule, or refusals to rule presented for review" (NYCRR 279.8 [c][2] [emphasis added]). In this case the parent's request for review simply numbers every paragraph, regardless of whether it contains statements of fact, statements of law, or allegations of IHO error without separately numbering the issues which the parent is advancing on appeal. Certain allegations of error on the part IHO are underlined, whereas others are not. While paragraph numbering is not prohibited, clear enumeration and identification of each issue is required and counsel for the parent has failed to do so.[18] The parent's failure to clearly assert what issues she was advancing, based upon the hearing record developed during the evidentiary hearing, is particularly problematic in this instance because the IHO's decision also lacked detailed.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]-[b]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).

[18] Part 279 of the practice regulations was amended, effective January 1, 2017, and while the former regulations mandated that "pleadings shall set forth the allegations of the parties in numbered paragraphs" (8 NYCRR 279.8[a][former 3]), that requirement was explicitly repealed in the practice regulations as amended (see 8 NYCRR Part 279). The regulations, as amended, neither require nor preclude a party from using numbered paragraphs in their pleadings but they do require that the parties number the issues they advance for review on appeal (8 NYCRR 279.8[c][2]).

In determining whether a request for review violates the practice regulations, it may be necessary, at times, to review evidence in the hearing record and the IHO's final decision, itself, for irregularities that may have led to the parent's inability to comply with the practice regulations (see generally Application of a Student with a Disability, Appeal No. 19-009 [remanding matter to the IHO due to poorly drafted IHO decision precluding petitioner's ability to formulate a request for review that complied with practice regulations]). Here, because the IHO's decision is so brief that the parent spend much of effort to challenging the decision as failing to meet minimum standards of legal practice, I decline in this instance to dismiss the parent's request for review for failure to comply with the practice regulations as I am able to ascertain some key areas focused on by parent that tend to allege error regarding an issue disputed during the impartial hearing that is also identified in the parent's case information statement filed under the requirements of 8 NYCRR 279.2(e), which was filed using the Office of State Review's checkbox form. That form is not a substitute for a properly drafted request for review, but it is a good start in terms of guiding parties to identifying which issues that they seek to advance on appeal. If the parent, or the parent's attorney for that matter, require additional guidance on how to prepare a request for review in compliance with practice regulations, assistance, including sample forms for what is expected in a request for review, is available on the Office of State Review's website (see https://www.sro.nysed.gov/book/prepare-appeal). Because pleadings filed by numerous attorneys at the law firm representing the parent have begun to engage in a similar pattern of noncompliance with the requirements of Part 279 discussed above, I caution that these practices must be corrected in future filings or risk outright dismissal.

While I have declined to exercise my discretion to reject the parent's pleading for failure to comply with State regulations governing practice before the Office of State Review, I will not read into the parent's appeal issues that are not sufficiently stated, as discussed further below (i.e., regarding annual goals).

### 2. IHO Conduct and Burden of Proof

Turning to the parent's allegations regarding the manner in which the IHO conducted the impartial hearing, State regulation provides that when a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]).[19] Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of

[19] However, State regulation does allow for extensions beyond 30 days but for no more than 60 days during the time that schools are closed pursuant to an Executive order issued by the Governor pursuant to a State of emergency for the COVID-19 crisis (8 NYCRR 200.5[j][5][i]).

availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Here, the record demonstrates that the IHO intended for the CSE to continue to meet and to consider and review the newly acquired IEEs despite the parent's desire for the evidentiary phase of the hearing to commence immediately (Tr. pp. 148). The parent's attorney made accurate statements insofar as an IEP that resulted from a new CSE meeting would not have changed previous events such as the allegations of violation in the due process complaint notice and the alleged denial of FAPE for the 2017-18, 2018-19, and 2019-20 school years (see Tr. p. 141), as any IEP changes going forward would not be relevant to the necessary prospective analysis of the IEPs created by the CSE for prior school years as required by the Second Circuit (R.E., 694 F.3d at 188). However, even the parent did not confine the case exclusively to matters involving prior school years, and implicated the student's programming on a going forward basis first by seeking compensatory education and, more directly, by seeking directives from the IHO for the CSE to

reconvene to consider the IEEs and to place the student in nonpublic schooling of the student (Dist. Ex. 18 at p. 7-8).[20] The IHO did not abuse his discretion by continuing the case while the CSE reconvened to consider the IEEs which was specific relief sought by the parents. It appears that the IHO was hopeful that such activity could yield a partial or complete resolution of the parties' dispute (see, e.g., Tr. pp. 138).

The parent contends that the IHO's conduct during the impartial hearing was improper asserting that he did not understand the nature of her complaints and at times did not appear to be paying attention during the impartial hearing. I note that there appeared to be several instances during the course of the impartial hearing when the IHO was distracted or expressing discomfort (Tr. pp. 192, 238). However, during the impartial hearing, which was conducted in disparate locations via video/telephone conference during the early stages of the COVID-19 pandemic, the IHO explained that the shift to a new hearing format had been difficult for him, that he did not "feel present" at the impartial hearing, and that he might need new computer skills or a new computer (Tr. pp. 159-163; 236-241).[21] But the hearing record does not support a finding that the parent was denied a right to present her case or that the hearing record was incomplete. Instead, the hearing record contains nearly 1400 pages of transcripts conducted over twelve hearing dates (see Tr. pp. 1-1384).[22] The parent is correct that the IHO's written decision contains only one page of findings, and thus I conclude that the written decision itself is unduly brief, unreasonably lacking in citation to specific evidence in the hearing record in order to support the conclusions reached by the IHO. However, the outcome is that the IHO's decision is worthy of little deference. In any event, I have conducted an impartial and independent review of the entire hearing record to resolve the particular issues that the parties have advanced on appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

Next, the parent contends that the district impermissibly shifted the burden of proof. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In rendering a decision, the burden of proof is applied to the available evidence not by the district,

[20] Over the course of the hearing, the parent specifically identified Shrub Oak as her preferred nonpublic school and asked that the IHO order, among other things, that the CSE to create IEPs with specific services and to prospectively place the student (see, e.g., Parent Post Hr'g Brief at p. 27). While the parent may not have alleged violations by the district involving the 2020-21 and 2021-22 school years, she nevertheless implicated the student's services for those school years.

[21] The IHO was not the only one during the impartial hearing that indicated the challenges of a virtual hearing (Tr. pp. 199, 386, 1262, 1291).

[22] That the IHO asked on two occasions if witness questioning had been completed was not improper or a basis to overturn the IHOs decision (Tr. pp. 652, 753). In one instance it appeared that the district's attorney was attempting to locate and present an exhibit onscreen during the virtual hearing (Tr. p. 763).

but by the IHO. There is no indication in the hearing record that the IHO did not properly apply the burden of proof to the district and the parent does not assert that the IHO shifted the burden of proof. As such, the allegation that the IHO decision must be reversed due to allegations that the district attempted to shift the burden of proof is without merit.

**B. Sufficiency of Evaluative Information**

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

Specifically, the parent contends that the district did not conduct a speech-language evaluation, a PT evaluation, an FBA or BIP, or an assistive technology evaluation (Dist. Ex. 18 at pp. 4-6).[23] However, it is not clear what effect upon the student's programming the parent believed the allegedly improper reevaluation had, because parent did not assert that the district's description of the student's needs in his IEPs was lacking in either the due process complaint notice or after the impartial hearing in the request for review. Initially, it is noted that the parent's assertion regarding the lack of a speech-language evaluation is without merit as the district conducted this evaluation in April 2018 as part of the 2018 triennial review (see Dist. Ex. 9). Further, the district also conducted an assistive technology evaluation in December 2018 after the parent requested this evaluation (see Dist. Ex. 13). Although, the parent contends that they did not receive a copy of this evaluation, the record demonstrates that the CSE reviewed this evaluation at the subsequent

[23] Regarding the allegations of the assistive technology evaluation, the parent indicated that she did not receive a copy of any such evaluation (Dist. Ex. 18 at pp. 4, 6).

CSE meeting (Dist. Ex. 17 at p. 5). State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine initial eligibility (8 NYCRR 200.4[b][i]-[v]), but it is left to the collaborative process of the CSE during to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]).[24] The April 2018 PT report appears to be an annual progress report rather than a formal reassessment, which in and of itself is not an impermissible procedure. Despite the lack of a formal evaluation, the evidence in the hearing record does not show that the CSE failed to properly understand the student's needs or that the student's present levels of performance regarding his PT needs were inaccurate. As such, the failure of the CSE to determine whether to conduct a formal PT evaluation among particular needed assessments during the 2018 triennial review was unlikely a procedural violation, but in any event did not rise to the level of a denial of FAPE.

Moreover, the parent's relief sought for the alleged failure to comprehensively evaluate the student was to obtain IEEs, most of which the parent has since obtained. As noted above, the parent has yet to obtain an FBA/BIP IEE; however, the record shows that that at the time of the impartial hearing, that evaluation had been granted by the district and the hearing record indicates that the only reason it had not been completed was due to the ongoing COVID-19 pandemic (Tr. p. 109-10, 117-18).[25] As such, the parent has received her requested remedy on that issue and I am not convinced any further relief is warranted, especially in light of the student's progress which is further described below.[26]

Moreover, regarding the parent's argument that the district failed to timely respond to her request for IEEs, the record does not support a finding that FAPE was denied for this alleged failure. The argument by the parent's attorney during the impartial hearing that the district had only 10 days to grant the IEEs or commence an impartial hearing is without foundation (see Tr. pp. 216). CSE did act promptly following the parent's September 13, 2019 IEE request by holding a CSE meeting to discuss the matter on October 2, 2019 (see Parent Exs. E; EE). The hearing record demonstrates that the CSE did inform the parent that they would agree to authorize the IEEs; however, it is unclear whether the parent's preferred providers would meet district criteria

[24] State regulations provide that "[t]he reevaluation shall be conducted by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the student's disability" and that "the reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]).

[25] The parties differing views regarding the student's behavior is addressed further below.

[26] The parent also asserts that the district failed to provide her with prior written notices that stated what the CSE relied upon as a basis for their proposed actions. While the parent is correct that the prior written notices lack all the information required pursuant to federal and State regulations (see Parent Exs. BB, CC; Dist. Exs. 34, 36; see also 34 CFR 300.503[b]; 8 NYCRR 200.5[a]), at most, this amounts to a procedural violation; however, there is no evidence in the hearing record that the 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]). In contrast to the prior written notices issued in 2017, 2018, and 2019, after the June 2020 CSE meeting, the district did provide the parent with a prior written notice that more closely aligns with the requirements of federal and State and federal regulation (see Dist. Ex. 30). The district is reminded that going forward should continue provide the parent with prior written notices that comply with the regulations.

for IEEs and whether a formal approval was sent to the parent (see Tr. p. 214). Following the start of the impartial hearing, there was a clear delay as the parent did not obtain the IEEs until March 2020, but this delay does not support a finding that the student was denied a FAPE as the parent was able to complete nearly all of IEEs requested (except the FBA). Notably, the authorization of the IEEs at public expense by the parent's preferred provider would have been the appropriate relief I would grant for any delay in authorization by the district, not a finding of a denial of FAPE. As such, the parent has obtained appropriate relief.

### C. Provision of FAPE

#### 1. Annual Goals

Review of the parent's due process complaint notice reveals that she focused her challenge to the annual goals set forth in the student's IEPs to allegations about the measurability thereof (see Dist. Ex. 18 at p. 6). On appeal, the parent does not directly allege that the annual goals were inappropriate and makes no mention of their measurability. The request for review only references that the due process complaint notice included a challenge related to annual goals (Req. for Rev. ¶ 4). In her memorandum of law, in the context of challenging the CSEs' recommendations (or lack thereof) for assistive technology and speech-language therapy, the parent attacks the district's position that the student made progress toward achieving annual goals and that, therefore, the CSEs' similar recommendations from year to year were appropriate. In this context, the parent alleges that the student's annual goals were not appropriately ambitious and were not appropriate for his "disability profile" (Parent Mem. of Law at pp. 23-24). As an example, the parent alleges (without citations to the hearing record) that the student's IEP(s) included a goal requiring the student to verbalize a greeting was not functional for him but, instead was avoiding the fact that the student could verbalize a greeting, among other things, with an appropriate assistive technology device.

Overall, the parent's argument regarding the annual goals is insufficiently stated on appeal.[27] Nevertheless, out of an abundance of caution, I note the following regarding the annual goals.

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

[27] To the extent the parent sets forth the argument about the annual goals being insufficiently ambitious only in her memorandum of law, a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Davis, 2021 WL 964820, at *11; Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised.

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]).

When the student transferred from a nearby district in February 2017, the March 2017 CSE adopted the IEP developed for the student by the previous district for the remainder of the 2016-17 school year (Dist. Ex. 3 at p. 1). The IEP included several annual goals and corresponding short-term objectives (compare Dist. Ex. 1 at pp. 9-13, with Dist. Ex. 3 at pp. 1, 11-15). The reading goals targeted the student's ability to identify sight words and match words to pictures; the writing goals targeted the student's ability to copy and print letters and spell 10 simple words; the math goals targeted the student's ability to match numbers to objects, understand math vocabulary (more, some, all, none), and add single digit numbers; the speech-language goals targeted the student's ability to produce target sounds in the initial position, and complete phrases using augmentative communication; a social/emotional goal targeted the student's ability to engage in cooperative play; the motor goals targeted the student's ability to broad jump, complete general conditioning exercises, develop in-hand manipulation skills, and increase grip strength; and an ADL skill targeted the student's ability to request a desired or needed item using the iPad (Dist. Ex. 3 at pp. 11-15).

In order to develop the student's IEP for the 2017-18 school year, the April 28, 2017 CSE considered a February 2017 education report, OT reevaluation report, PT annual review report, a communication plan, and a speech and language annual review report and developed updated annual goals (see Parent Exs. H; I; J; K; L; compare Dist. Ex. 3 at pp. 11-15, with Dist. Ex. 4 at pp. 5, 13-17).[28] The April 2017 CSE updated the reading annual goal related to sight word identification to include the use of an iPad, composed a writing/spelling goal which also included the use of an iPad as well as pencil and paper, and a printing goal that integrated writing of numbers (Dist. Ex. 4 at pp. 13-14). In addition, the April 2017 CSE altered the student's single-digit addition mathematics goal and short-term objectives from the March 2017 IEP to include the completion of specific math facts within specific time frames (compare Dist. Ex. 3 at p. 13, with Dist. Ex. 4 at pp. 13-14). The April 2017 CSE also composed an additional mathematics annual goal that targeted the identification of money by name and value of bills and coins (Dist. Ex. 4 at p. 14). With respect to speech and language goals, the April 2017 CSE altered the student's previous categorization goal to target verbalization of members of a category (compare Dist. Ex. 3 at p. 13, with Dist. Ex. 4 at p. 14). In addition, the CSE composed a goal that targeted performing oral motor movements upon verbal command, as well as a goal that targeted taking turns with other students during group instruction activities without prompts (Dist. Ex. 4 at p. 15). The April 2017 CSE developed a social/emotional/behavioral annual goal that targeted the student's ability to ask his peers for items to be shared (id.). With respect to motor goals, the CSE added several goals to the April 2017 IEP that targeted completing increasing repetitions of core strengthening exercises, increasing lower extremity strength and coordination toward jumping, correct manipulation of an object using bilateral hands, and improving postural control for skilled distal functioning during

[28] The March 2017 CSE recommended the continuation of the student's then-current placement in an 8:1+2 BOCES classroom for the remainder of the 2016-17 school year; the same providers who wrote the February 2017 reports 'continued to be the student's providers after he switched school districts (Dist. Ex. 3 at pp. 1, 15-18; see also Parent Exs. H; I; J; K; L).

functional/fine motor activities such as writing and computer tasks (id. at pp. 15-16). The April 2017 CSE altered a goal form the March 2017 IEP targeting grip strength to more specifically target the use of intrinsic strength to grasp and manipulate malleable materials without fatigue for 20 minutes (compare Dist. Ex. 3 at pp. 14-15, with Dist. Ex. 4 at p. 16). With respect to basic cognitive/daily living skills annual goals, the April 2017 CSE developed goals that targeted the student's ability to complete daily living skills as well as a goal to target the student's ability to recognize and use five new signs to communicate basic wants and needs (Dist. Ex. 4 at pp. 16-17). For each annual goal, the CSE included the criteria (three out of five trials over 10 months, 80% success on three consecutive occasions), the method (data collection, recorded observation), and the schedule (daily, bi-weekly) (id. at pp. 13-17).

In order to develop the student's IEP for the 2018-19 school year, the May 18, 2018 CSE considered an April 2018 PT progress summary, speech/language evaluation, educational evaluation, OT evaluation, as well as February 2018 classroom observation and psychological evaluation, and composed updated annual goals (see Dist. Exs. 5 at pp. 1-5; 6 at pp. 1-6; 7 at pp. 1-4; 8 at pp. 1-3; 9 at pp. 1-3; Dist. Ex. 10 at p. 4, 12-15). A new reading goal targeted the student's ability to listen to a teacher-read story and answer "wh" questions; and a writing goal focused on the student placing pictures in correct order after reading a story (Dist. Ex. 10 at pp. 12-13). Although the spelling goal in the May 2018 IEP was similar to the spelling goal from the April 2017 IEP in that it targeted the student's ability to spell 15 sight words, the May 2018 CSE recommended utilizing magnetic letters to spell the sight words (compare Dist. Ex. 4 at p. 13, with Dist. Ex. 10 at p. 13). The May 2018 CSE composed a mathematics goal to target the student's ability to complete single digit addition and subtraction without using objects (Dist. Ex. 10 at p. 13). Two of the speech-language goals targeted the student's ability to comprehend and use the present progressive and past tenses when formulating 20 sentences (id. at pp. 13-14). Another speech-language goal focused on the student's utilization of "AAC" (i.e., augmentative and alternative communication) and expanding his utterances to a four-to-five-word response (id. at p. 14). With respect to a social/emotional/behavioral goal, the May 2018 CSE targeted the student's ability to play cooperatively, take turns, and wait for items that he wanted without inappropriately displaying frustration (id.). The motor goals for the 2018-19 school year focused on performance of writing and visual perceptual tasks to improve the student's overall writing skills, cutting along curved lines to improve the student's overall scissor skills, improvement of core strength through conditioning exercises, as well as improvement in the student's balance so that he could step off a vestibular/unstable surface independently (id. at pp. 14-15). In addition, the May 2018 CSE composed a basic cognitive/daily living skills goal that targeted the student's ability to stay focused on his tasks and not be concerned with what his peers were doing (id. at p. 15). For each annual goal, the CSE included the criteria 75% with moderate assistance on three consecutive occasions, 80% success on three consecutive days), the method (work samples, data collection, observation checklists), and the schedule (daily, quarterly) (id. at pp. 12-15).

In order to develop the student's IEP for the 2019-20 school year, the April 3, 2019 CSE considered a December 2018 assistive technology evaluation, a February 2019 education progress report, a March 2019 PT progress summary, OT progress summary, and speech-language progress summary, and composed updated annual goals for the student for the 2019-20 school year (see

Dist. Exs. 13 at pp. 1-4; 14 at pp. 1-5; 15 at pp. 1-3; 16 at pp. 1-2; 17 at pp. 5, 13-17).[29] The reading goal targeted the student's ability to spell 20 four to five- letter words using magnetic letters, and another reading goal focused on the student's ability to identify the main idea of a short story (Dist. Ex. 17 at pp. 13-14). The April 2019 CSE composed the student's mathematics goals to target telling time using an analog clock, solving eight double-digit addition problems without regrouping using pictures, and six double-digit subtraction problems without regrouping and using pictures or objects (id. at p. 14). One speech-language goal targeted the student's ability to navigate his device from the home page to formulate a simple sentence to label, describe and/or answer questions, while another goal focused on the student's ability to initiate and ask for help when he was having difficulty (id. at pp. 14-15). With respect to social/emotional/behavioral goals, the April 2019 CSE targeted the student's need to maintain positive relationships with his peers by sharing and playing appropriately during structured and unstructured play time; to interact with all of the teachers in the room and work appropriately with the teacher assigned to him; and when prompted, to identify his own emotions/feelings and their intensity as well as strategies for dealing with them (id. at pp. 15-16). The CSE composed a motor skills goal that targeted improving the student's visual motor skills by increasing typing speed and accuracy, and another that focused on the student's ability to step up onto an unstable surface with supervision, as well as a goal that targeted the student's ability to print a sentence with correct form, size, space, and orientation (id. at p. 16). Although similar to a goal targeting grip strength in the March 2017 and April 2017 IEPs, the April 2019 CSE altered the goal to target use of intrinsic strength to grasp and manipulate malleable materials without fatigue for 10 minutes (compare Dist. Ex. 17 at pp. 16-17, with Dist. Ex. 3 at pp. 14-15, and Dist. Ex. 4 at p. 16). For each annual goal, the CSE included the criteria (three out of five trials over 10 months, 70% on three consecutive days), the method (data collection, work samples), and the schedule (daily, quarterly) (Dist. Ex. 17 at pp. 13-17). In addition, the district included the 2019-20 school year progress report for goals and objectives in the hearing record (see Dist. Ex. 39 at pp. 1-14).

As set forth above, the annual goals in each of the disputed IEPs were measurable, albeit at times broadly stated. Nevertheless, even if the hearing record supported the parent's original allegation in this matter that the annual goals were not sufficient measurable, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v, New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *10-*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). As for the parent's vague statements in her memorandum of law that the goals were not appropriately ambitious because the student was capable of more, review of the goals set forth above shows that, from year to year, the goals tended to become more difficult, as would be expected over time if the student was achieving his goals. The parent's single example that the annual goal requiring the student to verbalize a greeting was

[29] Although the March 14, 2019 PT progress summary was included as part of the Evaluations/Reports in the April 3, 2019 IEP and information regarding physical therapy was part of the present levels of performance, the summary itself is not included in the hearing record (see Dist. Ex. 17 at pp. 5-9). The student's physical therapist who testified did not compose the March 2019 PT summary because she was not the student's physical therapist at that time (Tr. pp. 510-513).

not appropriate since he was able to communicate with assistive technology is particularly perplexing argument given the parent's allegation on appeal that the assistive technology provided to the student was not effective at facilitating his functional communication. Overall, while the parent has failed to clearly state her allegations in the request for review relating to the annual goals as required, even considering the goals out of an abundance of caution, review of the hearing record shows that the parents vague statements are without merit.

**2. Special Class Placement and Related Services**

The IHO found that the record confirmed that the student was placed in an academic environment which allowed him to progress with peers and that a "review of the student's progress during the years, 2017 to 2020 at the Kaplan School, reported progress in most goals as outlined" (IHO Decision at p. 2). In their appeal, the parent alleges that the district failed to provide the student a FAPE for the 2017-18, 2018-19, and 2019-20 school years due to its failure to provide the student with an "appropriate placement" and its "failure to recommend appropriate related services." "Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011], citing Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94, [E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017] [examining carryover of goals and services from a student's IEP from a previous school year and noting that, "[w]here a student's needs and objectives remain substantially the same, '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'"], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *11 [S.D.N.Y. Sept. 27, 2016]; D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011] [determining that evidence of likely progress was "the fact that the [challenged IEP] was similar to a prior IEP that generated some progress"], aff'd, 506 Fed. Appx. 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011] [finding that when the student made some progress under a previous IEP, it was not unreasonable for the CSE to propose an IEP "virtually identical to" the previous one]; M.C., 2008 WL 4449338, at *16 [determining that when the IEP at issue mirrored a past IEP under which the student "demonstrated significant progress," the IEP at issue was reasonably calculated to afford the student educational benefit]; see generally Application of a Student with a Disability, Appeal No. 12-064; Application of the Bd. of Educ., Appeal No. 11-128).[30]

With respect to the student's special class placement for the 2017-18, 2018-19 and 2019-20 school years, the CSEs recommended an 8:1+2 special class placement in the program at the Kaplan School (Dist. Exs. 4 at p. 17; 10 at p. 16; 17 at p. 17), which is the same programming that the student had been receiving prior to his move from East Ramapo. As noted above, the IHO

[30] At least one court has been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 [3d Cir. 1995] [noting, however, that the two IEPs at issue in the case were not identical as the parents contended]).

found that the student was placed in an academic environment that allowed him to progress with peers and that the student's school reported progress in most goals as outlined.

Turning to the 2017-18 school year, according to the April 2018 educational-annual/reevaluation report, the student made progress, was doing well in all group activities, was working towards achieving all of his IEP goals, used a token board had been very effective, required constant praise and behavioral management strategies, and had grown into a mature young man who was becoming more independent (Dist. Ex. 6 at pp. 1, 2-3). An OT annual reevaluation report indicated that the student was independent in most areas of critical activities required for daily living skills, demonstrated understanding of basic self-help skills, was able to follow two-step directives, and worked well in structured environment with daily routines (Dist. Ex. 7 at p. 1). In addition, the April 2018 OT report noted that the student demonstrated slow, steady improvement, but that his performance continued to fluctuate according to his mood, behavior, and willingness to cooperate on a given day (id. at p. 3). Aside from identifying the progress made on specific goals, detailed above, the April 2018 physical therapy annual report did not comment specifically on progress that the student had made (Dist. Exs. 8 at pp. 1-3; 9 at pp. 1-3). The speech-language annual review/reevaluation report provided a narrative description of the student's progress toward his annual goals which identified the categories into which the student was able to sort items (Dist. Ex. 9 at p. 3). According to the report, the student had demonstrated the ability to create labial closure for sounds /p/ and /b/ but continued to have difficulty imitating isolated, repetitive, and alternating labial movements (id.). With regard to turn-taking, the report stated that the student was able take turns without difficulty but has some difficulty accepting going second or third (id.). The student's 2017-18 progress report for goals and objectives indicated that the student achieved his reading and writing, mathematics, as well as two of three of his speech/language goals by June 2018 (Dist. Ex. 37 at pp. 1-8). The report noted that the student was making progress toward his third speech/language goal and achieved his three social/emotional/behavioral goals (id. at pp. 7, 9). In addition, according to the report, the student achieved four out of five motor goals and both basic cognitive/daily living skills goals by June 2018 (id. at pp. 10-15).

Turning to the 2018-19 school year, according to the February 2019 educational report, the student was "doing well expressing his wants and needs," was able to "say some words clearly," and was working toward achieving all of his IEP goals (Dist. Ex. 14 at p. 1). The report also indicated that the student did well during group activities that were meaningful to him, became frustrated when not called on his by his teacher, at times agitated peers and had difficulty sharing toys (Dist. Ex. 14 at p. 1). With respect to academics, for example, the report indicated that the student was a hard worker, enjoyed working on his assignments, continued to work on improving his reading skills, was able to read over 30 sight words, and after reading a very short story, he was able to sequence the story in the correct order, and the student was able to answer "wh" questions (id. at p. 1). Further, with respect to mathematics, the student no longer used objects to get the answer, and the student identified coins and some bills and helped to count money to pay for his breakfast when out in the community (id. at p. 2). According to the report, the student's handwriting skills were being worked on with his occupational therapist, and he was able to trace and print all letters and numbers independently but needed to learn how to form the letters correctly (id.). The report indicated that socially, the student was usually able to use behavioral strategies to help him calm down when he was upset; however, the report also indicated that the student got very jealous when his friends earned something before he earned it, and it had started to interfere

with his progress (id. at p. 3). In addition to the February 2019 educational report commenting that the student was completely independent with his ADL skills, and he walked the halls independently, the March 2019 OT annual review report confirmed the student's ADL independence as well as noting physical development present levels of performance, strengths and needs (Dist. Exs. 14 at p. 2; 15 at pp. 1-2). The March 2019 speech/language annual review report indicated that the student was able to convey his wants needs and ideas in a number of different ways to a variety of staff members, and that he was able to carry over learned material (Dist. Ex. 16 at pp. 1-2). According to the student's 2018-19 progress report for goals and objectives, the report indicated that the student achieved his reading and writing goals by June 2019 (Dist. Ex. 38 at pp. 1-4). In addition, the report noted that the student was progressing gradually toward his mathematics goal and achieved his speech/language goals (id. at pp. 1, 5-8). The report indicated that the student was progressing satisfactorily toward his social/emotional/behavioral goal, achieved three of his motor goals, and was progressing gradually toward another motor goal (id. at pp. 9-14). The student made inconsistent progress on his basic cognitive/daily living skills goal, and it was determined the student would work on the goal the next school year (id. at p. 15).

Turning to the student's 2019-20 progress report for goals and objectives, the report indicated that the student achieved his reading goals by June 2020 (Dist. Ex. 39 at pp. 1-3). With respect to the mathematics goals, the student achieved benchmarks for telling time up to and including the half-hour and hour, but the report noted that the student was "starting to learn to tell time on the quarter after and quarter of" before the closure of school on March 13, 2020 (id. at p. 4).[31] Two additional mathematics goals noted that the student achieved the addition and subtraction of six double- digit problems which were partially achieved goals (id. at pp. 4-6). The student achieved all of his speech/language and social/emotional/behavioral goals (id. at pp. 7-11). With respect to the student's visual motor skills goal, the student achieved benchmarks through April 2020, and was making gains with typing and decreasing mistakes with both hands on the keyboard when trying to help increase typing speed before school closure in March 2020 (id. at p. 12). The report indicated that the student achieved benchmarks during the 2019-20 school year with respect to stepping up onto unstable surfaces with supervision; and continued to work on single leg standing activities to practice balance skills (id. at pp.12-13). With respect to the student's printing goal, the student was progressing satisfactorily and continued to benefit from strong visual guides and a one-inch writing space with verbal cues to slow down the pace of writing to increase legibility and to erase work when needed (id. at pp. 13-14). The student's fine motor goal was achieved (id. at p. 14).

With respect to the student's progress in the 8:1+2 special class placement at the Kaplan School, the district director of special services testified that prior to the receiving the parent's due process complaint notice, she was not informed that the parent was in any way not pleased with the student's progress or placement at the Kaplan School (Tr. pp. 190; see Tr. pp. 211-12).[32] The principal from the Kaplan School testified that according to a review of the information available at the time the 2019-20 IEP was developed, the student mastered many goals and achieved them and even though the April 2019 IEP indicated that the student's jealousy of his friends had started

[31] The school closed due to COVID-19 on or around March 13, 2020 (Tr. p. 652).

[32] The director of special services began working for the district in July 2019 (Tr. p. 182; see Tr. p. 159).

to interfere with his progress, "it didn't actually impede his progress because he was able to make progress towards his IEP goals" (Tr. pp. 337-39, 354-55; Dist. Ex. 17 at p. 11). The student's special education teacher testified that during the 2018-19 school year the student demonstrated jealousy and frustration when a preferred staff person worked with another student (Tr. pp. 883-84). She noted that if the jealousy occurred during academic time it would take away from learning and his teacher would need to reteach him the skill (Tr. p. 884) Although the April 2019 IEP noted that the student's behaviors were interfering with progress, the teacher explained that the behavior was managed, the student was able to participate in the class, and the behavior did not linger throughout the school day (Tr. pp. 883-85; Dist. Ex. 17 at p. 11). During the 2018-19 school year, the evidence showed that there were approximately eight behavior incidents recorded for the student (see Tr. 339).[33] One of the primary distinctions between the Kaplan School personnel and the parent's expert during the impartial hearing was precisely how soon an FBA should be conducted after the student exhibited a challenging behavior. According to the Kaplan School personnel, the student did not require an FBA as indicated by the testimony of several Kaplan School personnel and that any behaviors the student demonstrated during the 2017-18, 2018-19, and 2019-20 school years were managed in the classroom (Tr. pp. 194-95, 226-27, 275-76, 321-264, 328-30, 335, 339, 354-56, 399-405, 416-243, 750, 753-56, 775-76, 859-867, 878-81). The principal at the Kaplan School explained that an FBA would not be warranted for behaviors that were isolated or that were not ongoing, and that Kaplan utilized positive behavior intervention supports available to all students before moving toward an FBA and behavior specific interventions for a student (see e.g., Tr. pp. 321-22; 329-330). The parent's expert who was called during the impartial hearing, who had not yet had the opportunity to conduct FBA granted as an IEE testified regarding her viewpoint that an FBA should be conducted sooner, "any time where there is the presence of challenging behavior" (Tr. pp. 1241-42, 1245-50). Even if one pedagogical view was technically superior to the other, there is no evidence of a persistent pattern of interfering behaviors such that the failure to conduct an FBA and develop a BIP would result a denial of a FAPE for this student.

With respect to related services, the parent generally argues that the student was denied a FAPE for the 2017-18, 2018-19, and 2019-20 school years due to the CSE's failure to recommend appropriate related services. The parent alleged in her due process complaint notice that the CSE failed to recommend more than two 30-minute speech- language therapy sessions per week and had reduced the student's speech-language services from the 2017-18 to the 2018-19 school year. Further, in her due process complaint notice, the parent alleged that the district consistently recommended two 30-minute OT sessions per week even though the student had struggled to make progress with his visual perception and fine motor skills, particularly in the area of writing. In addition, the parent argued that the district had failed to recommend more than one 30-minute PT session per week despite the student's low safety awareness and limited muscle tone in his trunk and extremities. The IHO found that the student was provided a FAPE; and commented that the Kaplan School reported progress in most goals as outlined, and that the "design of the program as 'push-in' encouraged specialty sharing and generalization with school and ancillary personnel"(IHO Decision at p. 2). Upon review of the hearing record, as discussed below, I do not reach a different conclusion than the one stated by the IHO.

[33] In the subsequent school year the hearing record indicates there were zero (Tr. p. 355).

With respect to the CSE's recommendation to reduce the frequency of the student's speech-language therapy from one individual and two group sessions per week to two individual sessions per week for the 2018-19 school year, the director of special services testified that the student attended an 8:1+2 social communications class and this type of class often offered more push-in services than were generally allotted on an IEP (Tr. pp. 187-88; compare Dist. Ex. 4 at pp. 1, 17, with Dist. Ex. 10 at pp. 1, 16). The district chairperson testified that the reduction in speech services was a result of the Kaplan School changing from a pull-out program, where students received services in isolation, to a push-in program, where services happened in the classroom (Tr. p. 278). The chairperson explained that prior to 2018-19 school year, students who received speech and language therapy would be removed from their classroom, receive the related service in isolation in a therapy room, and then be returned their classrooms (Tr. p. 279). The chairperson noted that by providing the service in the classroom there would be more carryover and transfer of learning skills which also meant that the personnel involved in the classroom would become part of the carryover of those skills because they would be able to see what was happening and the expectations from the service provider (Tr. p. 279). Further, the principal of the Kaplan School stated that research showed that students generalized skills quicker in a push-in model and students also maintain skills longer when they were taught where they naturally occur; additionally, the principal explained that the push-in model for related services fostered much more communication between the provider and the teacher in the classroom (Tr. pp. 332-33). The minor changes in the student's programming do not undermine the evidence that the student had been making progress and that the progress was likely to continue. The hearing record shows that even with the reduction in the frequency of the student's speech-language therapy, the student achieved his speech-language goals for the 2018-19 school year (Dist. Ex. 38 at pp. 6-8), which tends to undermine the parents claim as it relates to the 2019-20 school year.

Turning to the parent's allegation that the district consistently recommended two 30-minute OT sessions per week even though the student had struggled to make progress with his visual perception and fine motor skills, particularly in the area of writing, a review of the student's progress reports belie that argument, revealing that the student made progress toward or achieved his visual perceptual or fine motor skills goals for the 2017-18, 2018-19, and 2019-20 school years (Dist. Exs. 37 at pp. 3-4, 11-13; 38 at pp. 11-12; 39 at pp. 12-14). For example, for the 2017-18 school year, the student achieved his printing goal, as well as goals that targeted manipulation of an object with bilateral hands and improving postural control during functional/fine motor activities such as writing and computer tasks (Dist. Ex. 37 at pp. 3-4, 11-13). For the 2018-19 school year, the student achieved his goals that targeted participating in writing and visual perceptual tasks for 20 minutes to improve his overall writing skills as well as participating in cutting along curved lines for 12 minutes to improve his overall scissor skills (Dist. Ex. 38 at pp. 11-12). With respect to the 2019-20 school year, the progress report noted that the student had been doing well towards achieving his goal to improve visual motor skills by increasing typing speed and accuracy prior to school closure in March 2020; that the student was progressing satisfactorily toward achieving a goal that targeted printing a sentence with correct form, size, space, and orientation with minimal visual cues; and that the student achieved a goal that targeted use of intrinsic strength to grasp and manipulate malleable materials without fatigue for 10 minutes (Dist. Ex. 39 at pp. 12-14). Based on the above, the hearing record does not support the parent's claim that the student struggled to make progress with his visual and fine motor skills particularly with writing.

Turning to the parent's claim that the district's failure to recommend more than one 30-minute PT session per week despite the student's low safety awareness and limited muscle tone in his trunk and extremities resulted in a denial of a FAPE, this claim is not supported by the hearing record. Although the 2017-18, 2018-19, and 2019-20 CSEs recommended that the student receive only one 30-minute session of PT per week, the student achieved or progressed gradually toward his 2017-18, 2018-19, and 2019-20 school year motor goals targeting core strengthening, increasing lower extremity strength and coordination in order to jump forward with feet together, and performing general conditioning exercises to improve core strength improving balance so that he could step off of an unstable surface with supervision or independently (Dist. Exs. 37 at pp. 10-11; 38 at pp. 12-14; 39 at pp. 12-13). The principal of the Kaplan School testified that the student did not demonstrate any difficulty ambulating on school grounds or with safety awareness, and that the student continued to receive PT services in the 2019-20 school year (Tr. pp. 309-310, 331, 347-51). The student's physical therapist for 2017-18 and 2019-20 school years testified that there were no safety concerns, that the student was fully functional and independent, and had never experienced any falls due to his gross motor abilities (Tr. pp. 481-82, 511, 520-23, 525-28; see Tr. pp. 465-66). The hearing record does not support the parent's claim that the district denied the student a FAPE due to the CSE recommending one 30-minute session of PT per week for the 2017-18, 2018-19, and 2019-20 school years.[34]

The evidence shows that the CSE offered the student similar programing in his IEPs from year to year and the trend showing his continued progress was likely to continue each year. Based on a review of the student's progress as presented in the hearing record, and discussed above, the student achieved the majority of his goals for each of the 2017-18, 2018-19, and 2019-20 school years and I agree with the IHO that the CSEs' recommendation for the 8:1+2 special class placement and the related services for each of these school years was appropriate and was reasonably calculated to enable the student to receive educational benefits in light of his circumstances.

### 3. Assistive Technology

Turning to the parent's arguments about assistive technology, Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).

[34] In addition, the parent's' claim that the district discontinued PT services in the 2019-20 school year is without merit as the physical therapist testified that the service continued through the 2019-20 school year and was recommended to cease for the 2020-21 school year (Tr. pp. 513-18).

For all three school years in question the CSE recommended that the student have access to an augmentative communication device throughout the school day and throughout the school environment (Dist. Exs. 4 at p. 18; 10 at p. 16; 17 at p. 17).

For the 2017-18 and 2018-19 school years, the April 2017 IEP and May 2018 IEP indicated that the student required assistive technology and the CSE recommended that the assistive technology device be used in the student's home (Dist. Exs. 4 at p. 13; 10 at p. 12). The April 2017 IEP noted that the student communicated his wants and needs using gestures, verbal approximations and/or his device (Dist. Ex. 4 at p. 7). Additionally, the student used an iPad to request reinforcers and for labeling common objects, people, and body parts (id. at pp. 7, 8). The April 2017 IEP noted that the student communicated with Proloquo2Go in addition to word approximations, gestures, touch, and reach and point (id. at p. 8). The IEP indicated that the student became frustrated, at times, when he was not understood and was beginning to rely on using the Proloquo2Go application to make his wants and need known (id.). The April 2017 IEP stated that the student was showing proficiency in Proloquo2Go and used the keyboard to type certain words (id.).

The April 2018 speech-language evaluation noted that the student had access to an iPad with Proloquo2go and Speak for Yourself applications (Dist. Ex. 9 at p. 2). The speech-language evaluator noted that the student "demonstrated the ability to respond to questions asked of him using the communication device" and that he navigated the device with ease (id.). Notably, when using the Speak for Yourself program, the student independently spelled familiar words or asked for help spelling the word to locate the icon (id.). The evaluator also indicated that the student was capable of formulating longer responses with alternate means of communication (id.). She noted that with the use of augmentative and alternative communication the student was able to request, comment, and respond to questions (id.). The evaluator noted that the student needed to increase his ability to formulate longer responses using his communication device and that he required access to a communication system to help him express himself more effectively (id.). The May 2018 IEP included information regarding the student's assistive technology device and applications as discussed in the speech-language evaluation (compare Dist. Ex. 10 at p. 8, with Dist. Ex. 9 at p. 2).

As part of the December 2018 assistive technology evaluation, the student was evaluated for several communication applications, specifically language acquisition though motor planning (LAMP) Words for Life, TouchChatHD, Proloquo2go, and Speak for Yourself (Dist. Ex. 13 at pp. 2-3; see Tr. p. 643). As a result of the evaluation, the district evaluator concluded that assistive technology would help the student increase his communication skills (id. at p. 3). The evaluator recommended that the student use the LAMP Words for Life application noting that it could be used on an iPad and the student did not display any difficulty scanning the icons to locate the desired item, was able to combine icons to formulate longer grammatically correct sentences, could successfully navigate between pages, and was able to access the message window and at times verbalized the sentence after hearing the message (id. at p. 4). The evaluator recommended that the parents and staff be trained in the program to ensure the application best met the student's communication needs (id.).

In addition to access to an augmentative communication device, for the 2019-20 school year, the April 2019 CSE recommended a speech-language consultation during the summer "to

continue to program [the] device with information" and a weekly speech-language consultation during the 1-month school year to "assist with programing of the device" (Dist. Ex. 17 at pp. 17-18).

The assistive technology IEE requested by the parent was completed on March 10, 2020 (see Dist. Ex. 22). The IEE indicated that the student should use an iPad with the TouchChat application and noted that exposure to the system needed to be consistent for the student to become a successful communicator (id. at p. 7). The IEE recommended that the student's family and staff/providers receive training on how to use the device to "optimize" the student's performance (id. at p. 8). Further, the evaluator recommended that the student have access to an iPad for use at home to improve literacy skills and encoding (id. at p. 11).

Overall, the evidence in the hearing record supports a finding that the CSEs' recommendations that the student have access to an augmentative communication device were appropriate (see Dist. Exs. 4 at p. 18; 10 at p. 16; 17 at p. 17) and the parent does not meaningfully argue otherwise. In asserting that the device(s) recommended for the student were inappropriate, the parent appears to be referring to the particular communication applications (i.e., Prologque2Go, Speak4Yourself, or LAMP) used by the student during the school years in question, which were not specified on the IEP. However, there is no authority that a specific application must be specified on a student's IEP. The certified occupational therapy assistant from the Kaplan School testified that the student didn't like using Proloquo2Go but knew how to use it (Tr. p. 761). The parent points to this testimony as evidence of "device abandonment," which one of her expert witnesses described as occurring when a device is not the right fit or the user doesn't have the right training, "so they just give up" (Tr. pp. 1077-78). In contrast, however, other evidence in the hearing record demonstrates that the student used the iPad and the applications thereon with success (see Tr. pp. 554-55, 870, 1075; Dist. Exs. 4 at p. 8; 10 at p. 8; 17 at p. 9).

Specifically, the BOCES speech-pathologist and assistive technology consultant (BOCES consultant) who provided services to the student during the 2017-18 school year and conducted the December 2018 assistive technology evaluation, testified that the student had access to the classroom iPad during that school year (Tr. pp. 631, 634, 637). She testified that the student used the Proloquo2Go application and that he had very good proficiency on it; however, that application was limiting because all of the things that he wanted to say were not on it (Tr. p. 636).[35] Still, the BOCES consultant testified that the use of assistive technology made the student less frustrated with his ability to communicate (Tr. p. 639). In addition to Proloquo2Go, the student had access to the Choice Board Creator application, which he was able to use fully (Tr. pp. 641-42). The BOCES consultant testified that when she conducted the evaluation, she determined that LAMP for Life was the most appropriate application for the student as he was able to access all of the features (Tr. pp. 643-45). She opined that the TouchChatHD app, which she tested, was not appropriate for the student because he did not understand how to use it as he became frustrated with having to navigate multiple pages (Tr. pp. 647-48). Moreover, she testified that he was able to do things with LAMP for Life that he was unable to do with TouchChat HD (Tr. p. 648).

[35] The BOCES consultant explained that the iPad, as programmed, included Proloquo2Go vocabulary that was relevant to school but not vocabulary that was relevant to the student's home limited '(Tr. p. 640).

Based on the foregoing, the evidence in the hearing record does not reflect that the information before the CSEs was such that the IEPs were required to specify a particular communication application in order to provide the student a FAPE or that the district's utilization of one application over another during the years in question was inconsistent with the IEP mandates or inappropriate.

The parent argues that the district "made no attempt to train [the student] or his parents on how to use [the iPad] at home" (Parent Mem. of Law at p. 21). The student's IEPs did not reflect recommendations for assistive technology training for the student or parents; however, specific to the parent's argument about the district's "attempt[s]" to offer training, the hearing record shows that she did not participate in the parent training and counseling offered to her by the Kaplan School, albeit the training was not necessarily intended to be specific to assistive technology training but could address the same if the parent had concerns in that regard (Tr. pp. 320, 548-49). In any event, the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. Jul. 24, 2013]). While the parent would no doubt benefit from parent counseling and training specific to the use of the student's assistive technology, here, the CSEs' failure to include such a services on the IEPs does not rise to the level of a denial of a FAPE.

Finally, the parent's argument about the assistive technology in the home was more related to a claim that the district failed to implement the IEP recommendations as the April 2017 IEP and May 2018 IEP did recommend that the student have access to the device in the home (see Dist. Exs. 4 at p. 13; 10 at p. 12). The IDEA requires that, once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243, 1251 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; see also

Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73, 75-76 [D.D.C. 2007] [holding that where a student missed a 'handful' of speech-language therapy sessions as a result of the therapist's absence or due to the student's fatigue, nevertheless, the student received consistent speech-language therapy in accordance with his IEP, and the district's failure to follow the IEP was excusable under the circumstances and did not amount to a failure to implement the student's program]).

The BOCES consultant testified that the student would have the iPad with Proloquo2Go sent home but that he would delete the apps on it and eventually the iPad stopped coming to school (Tr. p. 655).[36] She indicated that, at school, the staff was able to prevent him from deleting applications (Tr. p. 656). When the student did not bring the iPad from home, he had access to a classroom iPad (Tr. pp. 631, 760; see Dist. Ex. 22 at p. 2). The March 2020 IEE reflected that the student had an iPad with Proloquo2Go application installed on it "but that he rarely utilized it and he would erase the application if left unsupervised" (Dist. Ex. 22 at p. 2). Based on this, while the student's use of the device in the home was somewhat problematic due to the student's deleting of applications, the evidence in the hearing record does not support a finding that the district substantially or significantly deviated from the IEP since the student ultimately had access to a device when the IEP called for it.

Based on the foregoing, the evidence in the hearing record does not support the parent's arguments relating to assistive technology for the student.

**VII. Conclusion**

The IHO's written decision in this matter failed to reference the factual underpinnings of his conclusions regarding the parties' disputes with reference to the hearing record, and it failed to comport with standard legal practice. However, correction of the flaws in the IHO's decision drafting would not lead to a different outcome. The hearing record demonstrates that the district offered the student a FAPE for the 2017-18, 2018-19 and 2019-20 school years.

**THE APPEAL IS DISMISSED**.

**Dated:** **Albany, New York**
**May 24, 2021**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**

[36] The BOCES consultant testified that this occurred prior to the district becoming responsible for the student's special education services, which would have been prior to February 2017 (see Tr. p. 655; Dist. Ex. 2).