The University of the State of New York

The State Education Department
State Review Officer
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No. 21-154

Application of the BOARD OF EDUCATION OF THE LOCUST VALLEY CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Guercio & Guercio, LLP, attorneys for petitioner, by Douglas A. Spencer, Esq.

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, by Kerry McGrath, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Aaron School (Aaron) for the 2019-20 and 2020-21 school years. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has a history of global developmental delays and has received diagnoses of attention deficit/hyperactivity disorder (ADHD), combined presentation; a generalized anxiety disorder; compulsive excoriation (skin picking) disorder; a specific learning disorder with impairment in mathematics and reading; a nonverbal learning disorder; an auditory processing

disorder; a language disorder; and a specific chromosomal deletion (Dist. Exs. 1 at p. 1; 9 at pp. 14-15; 88 at pp. 8-9).[1]

The student initially qualified for special education services around the age of three as a result of speech-language delays (Dist. Exs. 1 at pp. 1, 3; 88 at p. 8). She attended a 12:1+1 integrated classroom from May 2013 through June 2015 and received occupational therapy (OT) and speech-language therapy (Dist. Ex. 88 at p. 9). Beginning in kindergarten (2014-15 school year) and through the middle of fifth grade (2019-20 school year) the student was parentally placed at the Portledge School, a private general education school (id.). From kindergarten through second grade, the student did not receive special education services but was later found eligible for special education as a student with a disability and received services through an individualized education services program (IESP) for third grade (Dist. Ex. 1 at p. 3).[2]

On April 17, 2019, a CSE convened to conduct the student's annual review and develop an IESP for the 2019-20 (fifth grade) school year (Dist. Ex. 6 at p. 1). The CSE determined the student was eligible for special education as a student with an other health-impairment and recommended daily resource room services, OT, speech-language therapy, and counseling services (id. at pp. 1, 7).[3]

In September 2019, the parents sought a private neuropsychological evaluation of the student to inform decisions regarding ongoing educational and therapeutic interventions for the student (Dist. Ex. 9 at p. 1).[4] On December 10, 2019, the parents executed a contract for the student's attendance at Aaron for the period of January through June 2020 (Parent Ex. F).[5]

In a letter to the district dated December 23, 2019, the parents requested "a CSE review meeting for the purpose of converting [the student's] IESP to an IEP" and indicated that "[i]n the interim and until such time as an appropriate full-time special education program [wa]s recommended for her," they were unilaterally placing the student at Aaron beginning on January 6, 2020 (Parent Ex. G).

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[1] One of the student's pediatricians indicated in a November 16, 2020 letter that due to the underlying genetic diagnosis, the student struggled with abstract reasoning, complex logic, and mathematical reasoning, as well as an attention deficit disorder, anxiety, and learning disabilities especially in math and reading (Parent Ex. Z).

[2] When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c).

[3] The student's eligibility for special education as a student with an other health-impairment is not in dispute (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

[4] The evaluation report, dated October 21, 2019, reflected that the evaluation was conducted as a follow up to a December 2016-February 2017 neuropsychological evaluation by the same examiner (Dist. Ex. 9 at p. 1; see Dist. Ex. 1).

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

On January 13, 2020, the CSE conducted a requested review/reevaluation review meeting (see Dist. Ex. 13). The student's management needs were described as requiring "the support of special education" to learn strategies for anxiety and attention (id. at p. 6). The January 2020 CSE recommended that the student attend a 12:1+2 special class once per day for 40-minutes and receive the following related services: three 45-minute sessions per week of individual OT (Cogmed refresher);[6] two 30-minute sessions per week of small group speech-language therapy; and one 30-minute session per week of small group counseling services (id. at pp. 1, 8-9). Additionally, the January 2020 CSE recommended several supplementary aids, services, and accommodations for the student including refocusing and redirection, preferential seating, allowance for breaks, checks for understanding, graphic organizers, reading out loud, use of manipulatives in math, and use of a highlighter and fact ring for reference, together with several testing accommodations (id. at pp. 9-10).

A CSE reconvened on March 4, 2020 for a requested review (see Dist. Ex. 26). The CSE discussed that the student's difficulties with "social anxiety, perspective taking, cognitive flexibility, working memory, non-verbal learning skills, inferential comprehension, motor and organizational planning, semantic relationships, math reasoning, and consistent performance in functional math and reading" impacted her socially and academically (id. at pp. 1-2). The CSE recommended that the student attend a 12:1+2 special class in English, math, and life skills (totaling five classes per day) (id. at p. 10). In addition, the March 2020 CSE recommended three 45-minute sessions per week of individual OT (Cogmed refresher) until March 21, 2020; two 30-minute sessions per week of small group speech-language therapy; one 30-minute session per week of small group counseling services; one 30-minute session per week of individual OT; one 30-minute session per week of small group OT, and two 30-minute sessions per month of individual counseling services (id.). The March 2020 CSE also continued the recommendations for supplementary aids and services, modifications, and accommodations set forth in the January 2020 IEP with the addition of support from a shared teaching assistant for science and social studies and provision of a copy of class notes (compare Dist. Ex. 26 at pp. 10-11, with Dist. Ex. 13 at p. 9).

The parents disagreed with the recommendations contained in the March 2020 IEP, and in an email dated April 16, 2020, notified the district of their intent to continue placement of the student at Aaron for the remainder of the 2019-20 school year and seek public funding for the costs thereof (Parent Ex. H at p. 2).

Thereafter, on May 18, 2020, a CSE convened to conduct the student's annual review and develop an IEP for the student for the 2020-21 school year (sixth grade) (see Dist. Ex. 41). The May 2020 CSE recognized that the student's attention, visual motor deficits, and anxiety all negatively impacted her academic performance requiring the support of special education services (id. at p. 8). The May 2020 CSE recommended that the student attend a 12:1+1 special class in English, math, science, and social studies (totaling five classes per day), as well as a daily 42-minute session of resource room (5:1) (id. at p. 11). The recommended related services consisted of one 42-minute session every other day of small group (5:1) speech-language therapy; two 42-

[6] Cogmed was described in the hearing record as a computerized program that worked on short term memory consisting of 25 half-hour sessions with three or five sessions per week, at which the student completed different exercises related to mathematical mental math and auditory comprehension activities (Tr. p. 1292).

minute sessions per week of individual OT; one 30-minute session per week of small group (5:1) counseling; two 30-minute sessions per month of individual counseling; and one 60-minute session per month of individual OT consultation (id.). The supplementary aids and services, modifications, and accommodations remained the same as the March 2020 IEP (compare Dist. 26 at pp. 10-11 with Dist. Ex. 41 at pp. 11-12). The May 2020 CSE also recommended an FM system in each of the student's classrooms (Dist. Ex. 41 at p. 12). Lastly, the May 2020 CSE recommended 12-month services of two 60-minute sessions per week of resource room (5:1), two 30-minute sessions per week of small group speech-language therapy, and two 30-minute sessions per week of individual OT (id. at pp. 1, 12-13).

On June 5, 2020, the parents executed a contract for the student's attendance at Aaron for the 2020-21 school year (from September 2020 through June 2021) (Parent Ex. R). The student received speech-language therapy and OT services from the district during summer 2020 (see Dist. Exs. 44, 64). In a letter to the district dated August 26, 2020, the parents set forth their disagreements with the recommendations contained in the May 2020 IEP and notified the district of their intent to unilaterally place the student at Aaron for the 2020-21 school year (see Dist. Ex. 52).

A. Due Process Complaint Notice

In a due process complaint notice, dated October 7, 2020, and amended on December 2, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 and 2020-21 school years (see Dist. Ex. 54; Amended Due Process Compl. Notice).

With respect to the 2019-20 school year, the parents alleged that the district failed to conduct an assistive technology evaluation and functional behavioral assessment (FBA) prior to the relevant CSE meeting (Amended Due Process Compl. Notice at p. 4).[7] The parents alleged that the IEP for the 2019-20 school year did not adequately describe the student's present levels of performance or note the parents' concerns (id. at p. 5). In addition, the parents alleged that the March 2020 IEP annual goals were vague, did not address the student's reading needs, and did not include OT annual goals with respect to the student's use of the laptop (id. at pp. 5-6). The parents contended that, for the 2019-20 school year, the CSE failed to recommend a small class for the student, inappropriately recommended that the student attend general education classes for science and social studies, failed to recommend small group instruction for both reading and math, and failed to address the student's anxiety and skin disorder or recommend a behavioral intervention plan (BIP) or assistive technology (id. at pp. 4-5). The parents argued that the district failed to provide them with a class profile for the proposed classroom and that this impeded their ability to participate in the CSE process (id. at p. 5). Finally, the parents alleged that the CSE failed to meet to develop a program for the student's remote learning due to the COVID-19 pandemic (id. at p. 6).

[7] In several places, the amended due process complaint notice references the March 2019 CSE meeting and IEP (see Amended Due Process Compl. Notice at pp. 4, 6); it is likely that the parents meant the March 2020 CSE meeting.

In reference to the 2020-21 school year, and specifically the May 2020 CSE meeting, the parents alleged that the district still had not conducted an FBA or assistive technology evaluation of the student and had failed to provide the parents with the audiological evaluation report prior to the May 2020 CSE meeting, which impeded their ability to participate in the development of the IEP (Amended Due Process Compl. Notice at p. 4). The parents also alleged that the May 2020 CSE failed to include Aaron staff at the meeting (id.). Concerning the May 2020 IEP, the parents alleged that the present levels of performance inadequately described the student's needs, the parents' concerns were inadequately noted, the annual goals were vague, inadequate, and unmeasurable, the CSE inappropriately recommended that the student attend a large public-school setting notwithstanding information that the student needed a smaller environment, failed to address the student's anxiety and skin disorder or recommend a BIP or assistive technology, and failed to identify research-based methodologies on the IEP (id. at p. 5). In addition, the parents asserted that the district again failed to provide a class profile for the proposed classroom (id.).

The parents argued that Aaron was an appropriate unilateral placement and that no equitable considerations would warrant a reduction or denial of tuition reimbursement (Amended Due Process Compl. Notice at p. 6). As relief, the parents sought district funding for the costs of the student's attendance at Aaron for the 2019-20 and 2020-21 school years (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 5, 2020 and concluded on March 10, 2021, after 12 days of proceedings (Nov. 5, 2020 Tr. pp. 1-60; Tr. pp. 1-2702; Mar., 10, 2021 Tr. pp. 1-77).[8] In a decision dated May 30, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years, that Aaron was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 30, 37, 45, 48-50). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Aaron for the 2019-20 and 2020-21 school years (id. at pp. 37, 50).

Concerning the 2019-20 school year, the IHO held that the district's failure to conduct a classroom observation, assistive technology evaluation, and FBA impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (IHO Decision at pp. 16-30). In addition, the IHO found that, prior to the January 2020 CSE meeting, the district did not conduct an updated educational evaluation, physical examination, social history, or classroom observation, and therefore, "abandoned" the opportunity to know the student's educational needs (id. at pp. 26, 30). The IHO held that the recommendation in the January 2020 IEP was predetermined and premature as additional evaluations needed to be conducted by the district (id. at p. 19). Additionally, the IHO held that the January 2020 IEP failed to provide for individual counseling or counseling goals to address the student's behavior in group counseling (id. at pp. 17-18, 30).

[8] The transcripts for the first and last dates of the impartial hearing were not consecutively paginated; accordingly, citations to the transcripts for those dates are preceded by the date of the proceedings.

Furthermore, the IHO held that March 2020 IEP was "inadequate and procedurally insufficient" to meet student's needs for 2019-20 school year (IHO Decision at p. 30). First, the IHO noted that none of the evaluations recommended at the January 2020 CSE meeting had been conducted prior to the March 2020 meeting (id. at p. 27). The IHO opined that "the overwhelming, dominant disability that was inhibiting this Student's progress was the social emotional component" (id.). Notwithstanding the student's social/emotional needs, the IHO found that the March 2020 IEP present levels of performance failed to identify the student's anxiety and skin picking as "predominant behaviors that interfere with her ability to successfully access and benefit from her special education program" (id.). The IHO also held that March 2020 IEP failed to contain transition planning and goals for the student's transition into the public school and that without such goals the student would not succeed (id. at pp. 27-28, 29, 30). Lastly, the IHO found that the parents should have been provided general information regarding the particular classroom in which the March 2020 IEP would have been implemented (id. at p. 28).

The IHO also held that the May 2020 CSE failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at p. 45). Initially, the IHO held that it was the district's responsibility to ensure participation of Aaron staff at the May 2020 CSE meeting, and by failing to include them it denied the student a FAPE (id. at p. 43). The IHO also held that the CSE's failure to conduct a classroom observation at Aaron, an FBA, and an assistive technology evaluation constituted a procedural violation that denied the student a FAPE (id. at pp. 42-44). The IHO found that the May 2020 IEP present levels of performance failed to describe the "extreme" manifestations of the student's "social emotion[al] disability" and the IEP lacked annual goals to address these needs (id. at p. 44). Regarding the parents' claim about appropriate reading and math interventions in the IEP, the IHO noted that, generally, a CSE was not required to specify a methodology for instruction on the IEP (id. at p. 41). Finally, the IHO found that the May 2020 CSE had no basis to recommend a 12-month program for the student for the 2020-21 school year (id. at p. 45).

After finding that the district denied the student a FAPE for the school years in question, the IHO held that the reports and testimony from Aaron staff demonstrated that Aaron was an appropriate unilateral placement for the student for both the 2019-20 and 2020-21 school years (IHO Decision at pp. 37, 49). The IHO found that Aaron provided for the student's academic needs, offered small classes, grouped students with similar social/emotional and educational needs, and included teachers who specialized in addressing the student's social/emotional, social pragmatic, executive functioning, and organizational needs (id. at pp. 48-49). Next, the IHO held that equitable considerations supported the parents' request for relief (id. at pp. 37-38, 49).[9] Based upon the forgoing conclusions, the IHO awarded partial tuition at Aaron for the 2019-20 school year and full tuition for the 2020-21 school year (id. at pp. 37, 50).

[9] As a part of the IHO's findings regarding equitable considerations, the IHO noted that the parents participated in the CSE process but were "denied information about the recommended special education classes and the schools [the student] was to attend" (IHO Decision at p. 49).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that the district denied the student a FAPE for the 2019-20 and 2020-21 school years and that Aaron was an appropriate unilateral placement for both school years, and in granting the parents' request for tuition reimbursement for the 2019-20 and 2020-21 school years.

In general, the district argues that the IHO's determinations that the district failed to offer the student a FAPE on procedural and substantive grounds for part of the 2019-20 school year and for the entire 2020-21 school year were not supported by the hearing record and were based on a misrepresentation of the hearing record and on incorrect legal standards. The district contends that the IHO relied exclusively on evidence presented by the parents, while "largely excluding evidence submitted by the District." The district also argues that the IHO improperly "substituted" his opinion for the "educational judgment and expertise of the CSE." Further, the district asserts that the IHO erred in addressing issues that were not properly raised, including that the district's obligation to conduct an educational evaluation, physical examination, and social history during the 2019-20 school year, that the January 2020 CSE predetermined the student's program, and that the district failed to recommend 12-month services for the student.[10]

With respect to the IHO's findings on specific issues, the district alleges that the IHO erred in his findings regarding the district's obligation to conduct an FBA, a classroom observation, and an assistive technology evaluation of the student for the 2019-20 and 2020-21 school years and regarding the sufficiency of the information available to develop an IEP for the 2020-21 school year. The district also objects to the IHO's finding that the district was required to engage with the parents to obtain the input of private professionals. The district further argues that the IHO ignored the impact of the COVID-19 pandemic during 2019-20 and 2020-21 school years in connection with the district's ability to conduct evaluations. The district alleges that the IHO erred in finding that the district was required to develop a plan for the student to transition from Aaron to a district public school during the 2019-20 school year. The district further asserts that the IHO erred in that he did not explain how the errors he identified regarding the present levels of performance for the January 2020 IEP and the May 2020 IEP either impacted the student's annual goals or deprived the student of a FAPE. The district asserts that the IHO erred in finding that the district denied the student a FAPE for the 2019-20 school year by failing to include counseling and social/emotional goals on the student's IEPs. With respect to the May 2020 CSE meeting, the district asserts that the IHO erred in finding that the district's failure to obtain the attendance of the student's classroom teacher from Aaron resulted in a denial of FAPE. In addition, the district asserts that the IHO erred in determining that the district's failure to provide the parents with information relating to the proposed classroom at the assigned public school site impeded the parents' opportunity to participate in the CSE process.

With respect to the IHO's determination that Aaron was an appropriate unilateral placement for the student for the 2019-20 and the 2020-21 school years, the district asserts that the IHO erred

[10] The IHO refers to extended school year (ESY) services; however, State regulation refers to these services as 12-month services (8 NYCRR 200.4[d][2][x]). Accordingly, these services are referred to as 12-month services throughout this decision.

in not considering the arguments and evidence presented by the district and that the parents failed to meet their burden of proof. With respect to equitable considerations, the district similarly asserts that the IHO erred in ignoring the arguments and evidence presented by the district.

As a final argument, the district contends that the IHO improperly removed exhibits from hearing record that were previously admitted into evidence thereby prejudicing the district.

In their answer, the parents generally deny the allegations contained in the request for review and request that the IHO's decision be upheld in its entirety. In addition, the parents argue that the request for review failed to comply with practice regulations governing appeals to the Office of State Review.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C.

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[11]

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-

[11] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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

The parents assert in their answer that the district's request for review should be rejected for failing to comply with form and content requirements for pleadings. In particular, the parents assert that the district's request for review exceeds page limitations and disregards regulatory requirements that a request for review clearly specify the reasons for challenging an IHO decision and include citations to the record on appeal. The parent also argues that the request for review was not accompanied by a notarized verification.

State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). State regulation also provide that all pleadings shall be verified by a party and provides that pleadings filed by the "trustees, the board of trustees, or the board of education of a school district"—i.e., the district—to be verified by "any person who is familiar with the facts underlying the appeal" and that "[a]ll oaths required by this Part may be taken before any person authorized to administer oaths by the State of New York" (8 NYCRR 279.7[b]).

Regarding the content of the pleading, 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]). State regulation further provides that a request for review shall set forth "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][3]).

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]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Here, regarding the page limitations, the request for review is a total of eleven pages; however, the substance of the request for review and the signature of the district's attorney appear all within the first ten pages, with the eleventh page setting forth only the names and addresses of the individuals to whom the district sent a copy of the request for review. As for the verification, the parents are correct that the district's attorney signed the document, but the verification is not notarized. While the district should have the verification notarized in the future, the deficiency does not warrant rejection of the district's pleading.

As for the content of the request for review, the parents are correct that the pleading lacks required citations and is not in all instance clear with regard to identifying the findings of the IHO challenged. That is, some allegations of IHO error are broadly stated without citations to the portions of the IHO's decision which the district appeals. For example, the district alleges generally that the IHO's findings are based on inaccurate misrepresentations of the record, are internally inconsistent, and based on a limited analysis and interpretation of the record (Req. for Rev. ¶¶ 29-31). These allegations are meaningless without reference or citation to the precise findings of the IHO referenced and, accordingly, they will not be further addressed. However, I decline to exercise my discretion to reject the request for review outright based on these allegations of noncompliance with the practice regulations.

Overall, the parents were able to respond to the district's request for view and there is no indication that they suffered undue prejudice as a result of the deficiencies in the district's pleading. However, the district's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review (8 NYCRR 279.8[a]; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).[12]

2. Scope of Impartial Hearing

The district argues that the IHO "impermissibly ruled on new matters" not raised in the due process complaint notice and as such the district was not afforded the opportunity to present a

[12] An examination of decisions issued in previous State-level administrative appeals in which the district's attorney appeared yields no serious admonitions with respect to the pleading requirements of Part 279.

defense with respect to these issues (Req. for Rev. at pp. 5-6). As the district argues, the IHO identified several evaluations that he found the district should have conducted and further held that the January 2020 CSE's placement recommendation was predetermined and premature as the district needed to conduct certain evaluations before determining the student's placement (IHO Decision at pp. 19, 30). In addition, the IHO found that the May 2020 CSE had no basis to recommend 12-month services for the student (id. at p. 45). The district argues that the findings relating to several of the evaluations, as well as predetermination and 12-month services were not properly before the IHO, and such findings were "improper and highly prejudicial" (Req. for Rev. at ¶¶ 16-18; 22).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

In reviewing the parents' due process complaint and amended due process complaint notices, there are no claims for predetermination or 12-month services (see Dist. Ex. 54; Amended Due Process Compl. Notice). While the parents raised the issue of the district's failure to conduct an FBA or an assistive technology evaluation (see Amended Due Process Compl. Notice at p. 4), the parents did not claim a procedural violation of the IDEA due to the district's failure to conduct an updated educational evaluation, physical examination, social history, or classroom observation leading up to the relevant CSE meetings for either the 2019-20 or 2020-21 school year. Also, there is no indication that the parents sought to further amend the due process complaint notice during the impartial hearing to include these claims or that the district agreed to expand the scope of the impartial hearing.

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]), here, the district did not pursue any questions related to a lack of district evaluations (i.e., educational evaluation, physical examination, social history, classroom observation), predetermination, or 12-month services during its direct examination of witnesses. And in fact, the parties agreed, and the IHO confirmed in his decision, that the issue of 12-month services was not a part of this proceeding (IHO Decision at p. 42).

As the parents did not raise and the district did not "open the door" to these issues, the IHO erred by addressing claims related to other district evaluations (educational evaluation, physical examination, social history, classroom observation), predetermination, and 12-month services.

3. Conduct of Hearing

Regarding the conduct of the hearing, the district argues that the IHO improperly removed exhibits from hearing record that were previously admitted into evidence. The district specifically notes that, on March 10, 2021, the IHO required a review of district exhibits 67-74, and 77-78, which had already been entered into evidence and, as a result of that review, removed "a number of exhibits" from the hearing record.[13] The district argues that the "IHO misrepresented the record, disregarded the law, and placed an onerous standard for admission of the evidence on the [d]istrict that was not equally applied to the [p]arent[s]" resulting in "prejudice" to the district (Req. for Rev. ¶ 32).

State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). In removing exhibits 69, 70, and 71 from evidence, the IHO held that the documents contained within those exhibits were duplicative of other more probative evidence in the hearing record, specifically the 2019 private neuropsychological evaluation (March 10, 2021 Tr. p. 30). The district does not point to a sufficient basis for a finding the IHO abused his discretion in removing the exhibits he deemed duplicative. Nor does the district argue that the exhibits were not, in fact, duplicative. Finally, the district does not elaborate on its conclusory assertion that it was prejudiced by the IHO's

[13] The district does not identify which exhibits the IHO removed from evidence. Review of the transcript of proceedings on March 10, 2021 shows that district exhibits 69, 70, and 71, which had previously been admitted into evidence without objection, were later excluded from the hearing record by the IHO (Tr. pp. 2231-32, 2235; March 10, 2021 Tr. pp. 25, 30-31).

evidentiary ruling. Therefore, I find no reason to disturb the IHO's removal of the district's exhibits 69, 70, and 71 from the hearing record.[14]

B. March 2020 CSE and IEP

1. Operative IEP - 2019-20 School Year

Initially, it is necessary to identify which IEP(s) should be examined for purposes of reviewing the appropriateness of the plan developed for the student for the 2019-20 school year. After the parent requested an IEP for the student during the 2019-20 school year, the CSE developed two separate IEPs – January 2020 and March 2020 (see Parent Ex. G; Dist. Exs. 13, 26).

The parents concede that they only seek reimbursement for the time period of the 2019-20 school year after they provided the district with notice of their intent to unilaterally place the student at Aaron and seek district funding of the costs thereof (Answer at p. 10 n.2). The parents' notice to the district was dated April 16, 2020 (see Parent Ex. H). Prior to this notice, the parents had informed the district that the parents were placing the student at Aaron on an interim basis but did not indicate that they intended to seek reimbursement from the district for the student's tuition (see Parent Ex. G). At the time of the parents' April 2020 notice, the March 2020 IEP was operative, having superseded the January 2020 IEP (M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP, even though it was developed after the parent's placement decision but before the due process complaint notice]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also M.C.., 2018 WL 4997516, at *25 n.3 [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215). However, as the recommendations included in the operative March 2020 IEP were developed at both the January and March 2020 CSE meetings, the conduct of both meetings are relevant to the analysis of the district's offer of a FAPE to the student for the 2019-20 school year (see Application of a Student with a Disability, Appeal No. 16-035).

Given that the March 2020 IEP is the operative IEP, the IHO's findings related to the January 2020 CSE meeting or resultant IEP shall not be further discussed or considered in connection with the district's obligation to offer the student a FAPE for the 2019-20 school year except to the extent that they underlie or further explain the IHO's findings concerning the March 2020 IEP (see IHO Decision at pp. 17-19, 26, 30).

[14] Although the IHO removed district exhibits 69, 70, and 71, and several other exhibits offered by the parent and the district were either excluded or withdrawn (i.e., parent exhibits A-E, and TT and district exhibits 76, 79-81, and 84-87), exhibits that were not entered into evidence were nevertheless included with the hearing record filed by the district on appeal. Documents that were not entered into evidence or which were removed from evidence at the impartial hearing have not been considered.

2. Sufficiency of Evaluative Information

The district alleges that the IHO erred in finding that the district's failure to conduct an FBA and an assistive technology evaluation of the student contributed to a denial of a FAPE. The FBA will be discussed separately below.[15]

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

The student was due for a reevaluation in December 2019 (Dist. Ex. 6 at p. 1). The school psychologist who also served as a liaison to Portledge (CSE liaison), participated in the January 2020 CSE meeting and testified that prior written notice of the reevaluation was provided, but at the time the parents were having a private neuropsychological evaluation completed and the parents "declined the psychological and the educational" evaluations to be conducted by the district

[15] The district also appeals the IHO's finding about the lack of a classroom observation; however, as discussed above, the IHO exceeded the scope of the impartial hearing in reaching this issue, so the IHO's finding is reversed on that basis. The district also indicates the lack of an audiological evaluation contributed to the IHO's finding. While the IHO made a determination that the district's failure to conduct the evaluations as planned prior to the March 2020 CSE meeting was a procedural violation (see IHO Decision at p. 27), he did not further examine the hearing record regarding the import of the lack of the audiological evaluation in particular. Moreover, review of the parents' due process complaint notice reveals that their compliant was specific to the FBA and assistive technology evaluation and the parents argued only in connection with the 2020-21 school year that the district failed to provide the parents with a copy of the audiological evaluation prior to the May 2020 CSE meeting. Thus, as the issue of the audiological evaluation was also not raised by the parents as an issue for review at the impartial hearing relating to the 2019-20 school year and the IHO did not directly address it, I will not discuss it further on appeal.

(Tr. pp. 123, 178, 241-42; see Dist. Ex. 13 at p. 1). The district agreed and the parents consented to the district conducting related services reevaluations (Tr. pp. 245-46; see Dist. Exs. 10-11).

Thereafter, the January 2020 CSE convened and reviewed the 2019 private neuropsychologist's report together with the updated speech-language report and OT report, as well as updates from the Portledge staff, resource room teacher, and parents (Tr. pp. 262-63; Dist. Ex. 6 at p. 2). The student's private neuropsychologist recommended that the student undergo an FBA, as well as an assistive technology evaluation "to identify methods to improve the quality and fluency of her academic productivity" (Dist. Ex. 9 at pp. 16-17). At the January 2020 CSE meeting, it was determined that the district would conduct additional evaluations of the student based on recommendations of the private neuropsychologist and that the committee would reconvene and further discuss the student's program and placement (Tr. pp. 330-32; see Dist. Ex. 13 at p. 1).

In a prior written notice dated January 21, 2020, the district notified the parents of the CSE's recommendation for further evaluations of the student, including an audiological evaluation, an FBA, and an assistive technology evaluation (Dist. Ex. 16). The student's mother provided consent for the evaluations on January 27, 2020 (Dist. Ex. 17).

On January 30, 2020, the director of pupil personnel services requested an assistive technology evaluation through the Boards of Cooperative Educational Services (BOCES) as the district did not conduct assistive technology evaluations (see Tr. pp. 143, 158; Dist. Exs. 18-19). Once the paperwork for the evaluation was completed, it was sent to BOCES for an appointment to be scheduled with BOCES staff (Tr. pp. 158, 332, 386, 425-26). Ultimately, the evaluation was not completed prior to the March 2020 CSE meeting.[16] The district points generally to delays associated with the COVID-19 pandemic, the closure of schools in March 2020, and the need for the evaluations to be conducted in person (see Tr. pp. 152, 156-57, 492-93, 547-48, 968-70, 1118, 1261-62). However, the impact of the COVID-19 pandemic does not explain the district's failure to complete the evaluations between January and March 2020.

Notwithstanding the district's failure to conduct the additional evaluations subsequent to the January 2020 CSE meeting, the student's March 2020 IEP reflects results of numerous assessments and information sources, including March 2020 classroom teacher reports, a March 2020 OT progress summary, January and March 2020 parent report and observations, and a December 2019 speech-language reevaluation (Dist. Ex. 26 at pp. 1, 3-4). Additionally, the neuropsychologist who had conducted the student's 2019 private neuropsychological evaluation attended the March 2020 CSE meeting, and the IEP meeting information summary indicated that the CSE had reviewed the "neuropsychologist's input and evaluation" (id. at p. 1; see Dist. Ex. 9). Review of the 2019 private neuropsychological evaluation report shows that the neuropsychologist relayed the student's background information, updated psychosocial history, and behavioral observations during testing, and administered a variety of cognitive, academic, attention/concentration, executive functioning, speech-language, visual-motor, learning/memory,

[16] An audiological and FM evaluation of the student was conducted on March 9, 2020 (Dist. Ex. 28) but not until after the March 2020 CSE meeting; that evaluation is discussed further below.

social perception, and projective assessments to the student, in addition to administering behavioral and social/emotional functioning scales to the parent and teacher (see Dist. Ex. 9).

As discussed above, the parents' challenge to the district's failure to conduct evaluations in this matter was specific to the FBA (discussed further below) and the assistive technology evaluation. While the parents' frustration with the district is understandable given the district's agreement to conduct additional evaluations, the lack of an assistive technology evaluation for the student is a procedural violation that does not rise to the level of a denial of a FAPE in this instance given that the CSE had sufficient information about the student's needs overall. While the March 2020 CSE did not have an assistive technology evaluation to review, the school psychologist who completed the referral form to BOCES for the assistive technology referral and the parent who completed an assistive technology information form attended the CSE (compare Dist. Ex. 19, and Dist. Ex. 21, with Dist. Ex. 26 at p. 1). In the referral form to BOCES, dated January 31, 2020, the school psychologist noted that the student had "difficulty keeping up in class," was slow to process information, and had deficits in both reading and writing (Dist. Ex. 19). As specific technology/devices for the evaluation team's consideration, the school psychologist identified a Chromebook with stylus, read and write software, and Bookshare (id.). The student's mother noted on the BOCES parent information form that the student's handwriting was slow, she had difficulty copying materials, her spelling was poor, and her attention deficits and anxiety interfered with her ability to write (Dist. Ex. 21). The mother indicated that the student improved in "her ability to capture her thoughts when she used the Read and Write program for Google Chrome a text to speech program" (id.). She shared that the student found an iPad easier to use than a laptop (id.). She believed that the student would benefit from assistive technology at home for "homework/school work" and from an FM system in the classroom to help her focus (id.). The mother further invited input from the evaluator on whether the student would benefit from phonetic spelling software or math related tools (id.). The March 2020 IEP reflects the needs identified by the school psychologist and parent as underlying the belief that the student would benefit from assistive technology (i.e., handwriting, attention, reading, writing, spelling) (Dist. Ex. 26 at pp. 6-7). The IEP also included annual goals and supplementary aids and services/program modifications/accommodations to address the student's attention, reading, writing, and handwriting (id. at pp. 8-11). Further, the March 2020 CSE discussed that each student received a Chromebook and that "OT [would] push-in to the classroom to assist [the student] with the [C]hromebook" (Dist. Ex. 26 at p. 6).

As such, the CSE had sufficient information about the student's needs from other sources and the IEP sufficiently addressed the areas of need underlying the request for an assistive technology evaluation such that the district's failure to conduct the evaluation does not, in this instance support a finding that the district denied the student a FAPE (see D.B. v. Ithaca City Sch. Dist., 690 Fed. App'x 778, 782 [2d Cir. 2017] [finding that, while a further evaluation was not conducted to consider potential benefits of assistive technology, the IEP addressed the student's needs]; see also C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *16-*17 [S.D.N.Y. Feb. 14, 2017]; S.Y. v. New York City Dep't of Educ., 210 F. Supp. 3d 556, 567 [S.D.N.Y. 2016] [holding that procedural violations, including untimely evaluations and the failure to obtain required evaluations, did not rise to the level of a denial of a FAPE where the CSE had adequate information about the student's needs]; K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *7-*8 [S.D.N.Y. Mar. 31, 2016] [holding that where evaluative materials provided detailed

information regarding the student's needs, the procedural violation of not conducting required evaluations did not rise to the level of a denial of a FAPE]; T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *7-*8 [S.D.N.Y. Mar. 30, 2016]; M.T. v. New York City Dep't of Educ., 165 F. Supp. 3d 106, 116 [S.D.N.Y. 2016]; N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *5 [S.D.N.Y. Feb. 24, 2016]).

3. Social/Emotional/Behavioral Needs: Consideration of Special Factors (Interfering Behaviors), Present Levels of Performance, and Annual Goals

The district asserts that the IHO erred in finding that the district's failure to conduct an FBA prior to the March 2020 CSE meeting denied the student a FAPE, as well as in finding that the present levels of performance on the March 2020 IEP did not identify the predominant behaviors that interfered with the student's ability to successfully access and benefit from her special education program, specifically naming the student's anxiety, her skin-picking behavior or compulsive excoriation, and her internal ambivalence and conflict resulting in distress and self-doubt. The district also argues that the IHO's conclusion that the March 2020 IEP failed to contain social/emotional goals is "contrary to the evidence and law" (Req. for Rev. at pp. 6-7).[17]

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a BIP for a student that is based upon an FBA (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

> the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

[17] The IHO found the March 2020 IEP failed to include social/emotional goals (IHO Decision at p. 30). In support of this conclusion, the IHO referenced the January 2020 IEP stating that it did not contain "any counseling goals to address the [s]tudent's behavior in the group counseling session, leaving no direction to the provider on how to proceed in addressing her unique counseling needs" (IHO Decision at pp. 17-18). The IHO did not directly make a determination relating to the annual goals in the March 2020 IEP. However, to discuss whether the March 2020 IEP addressed the student's social/emotional and behavioral needs, the annual goals will be examined.

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

The private neuropsychologist made several recommendations in the 2019 evaluation report, including that the student undergo an FBA "to address her assurance seeking, perseverative inquiries, and compulsive skin excoriation" (Tr. pp. 417, 2131-32; Dist. Ex. 9 at p. 16). This recommendation was reviewed at the January 2020 CSE meeting, and as noted above the CSE agreed to conduct the FBA (Dist. Ex. 13 at p. 1; see Dist. Exs. 16-17).

According to the school psychologist, the FBA was recommended to look at the student's skin picking and to determine how it was impacting the student in the educational setting (Tr. pp. 543-44, 974). She further testified that the FBA would look to see how often the skin picking was occurring and the time of day or specific class or situation that provoked the behavior, so FBA data would have to be collected throughout the entire school day and in all school settings (Tr. pp. 544, 549). Although the district provided prior written notice to the parents indicating the district's intent to conduct an FBA and obtained the parents' consent, the assessment was never completed (Dist. Exs. 16-17).

As an explanation for the failure to conduct the FBA, the district points to the district's general inability to complete evaluations during the COVID-19 pandemic (Tr. pp. 150-53) but again, the pandemic does not explain the district's failure to conduct an FBA between January and March 2020. For the FBA, however, the district's position about the environment for the assessment is broader than the pragmatic issues related to the pandemic and school closures. More specifically, testimony indicated that the FBA was an assessment that needed to be conducted in an academic setting, and specifically the program the CSE recommended, which was also confirmed by the student's private neuropsychologist (Tr. pp. 154, 463, 549, 2214).

The rationale that the FBA needed to be conducted in the setting in which the IEP would be implemented highlights a tension that exists between the environment-focused nature of an FBA and its relationship to when an FBA should be conducted. State guidance suggests that the decision of timing and the environment in which an FBA should be conducted is a matter under State policy that has been left to the CSE to decide ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," at p. 22, Office of Special Educ. [Dec. 2010] [noting the student's need for a BIP must be documented in the IEP, and, prior to the development

of the BIP, an FBA either "has [been] or will be conducted"] [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). As an FBA is defined as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment (8 NYCRR 200.1[r]), it is understandable that a district may want to wait for the student to transfer school environments prior to completing the evaluation (Bd. of Educ. of Wappingers Cent. School Dist. v M.N., 2017 WL 4641219, at *12 [S.D.N.Y. Oct. 13, 2017] [finding that, where the district evaluated the student at his out-of-State residential program and the out-of-State placement differed from the possible district placements, "the sole fact that [the district] did not conduct an FBA prior to the implementation of an IEP does not amount to a denial of FAPE"]).[18] On the other hand, in its opinion in R.E., the Second Circuit Court of Appeals stated that "the entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors" (694 F.3d at 190 [emphasis added]; see L.O., 822 F.3d at 111), evincing a view that an FBA should be drafted prior to or at the time of the development of the IEP, which must, by definition be completed before a student is placed.[19]

Here, even if I were to find that the district's failure to conduct an FBA of the student was a procedural violation, the March 2020 CSE nonetheless recommended appropriate and sufficient supports to address the student's behaviors (see Dist. Ex. 26 at pp. 7, 10-11). First, although the FBA had yet to be completed, the March 2020 CSE identified the student's needs related to anxiety and attention (id. at pp. 6, 7).

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1];8

[18] Once, in a summary order only, the Second Circuit explicitly addressed the timing for conducting an FBA in light of parallel IDEA and State regulatory standards then in effect, holding that it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district placement]). However, that decision was issued prior to and could not have addressed the timing factor in light of the State's subsequent promulgation of program standards in 8 NYCRR 200.22 and the addition of explicit definitions for the terms FBA and BIP to 8 NYCRR 200.1. Although FBAs and BIPs have become frequently litigated issues in New York in the special education context, none of the case law of which I am aware in New York has discussed in any significant detail either the timing factor or the environmental factor of the FBA, although a handful of cases have recognized and mentioned that such factors exist with respect to FBAs and BIPs (see, e.g., Bd. of Educ. of Wappingers Cent. School Dist., 2017 WL 4641219, at *12; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 365 [E.D.N.Y. 2014]; J.C.S., 2013 WL 3975942, at *13; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]).

[19] In R.E. and L.O., the Second Circuit indicated that, if a student has interfering behaviors, a BIP must be developed, citing 8 NYCRR 200.22 (R.E., 694 F.3d at 190; L.O., 822 F.3d at 111; see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 535 [2d Cir. 2017]; however, the Second Circuit did not discuss the whole of the text of the regulation, which indicates that the CSE "shall consider the development of a [BIP]" in certain instances, such as when "the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions" (8 NYCRR § 200.22[b]), which language is less absolute.

NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

As discussed above, comments in the meeting information summary of the March 2020 IEP indicated that the CSE reviewed the student's most recent evaluations, teacher and OT reports, progress, the parents' input and concerns, and the 2019 private neuropsychological evaluation of the student as well as input from the neuropsychologist (Dist. Ex. 26 at pp. 1-4). This information provided detailed information regarding the student's anxiety and interfering behaviors and, for the most part, the present levels of performance in the March 2020 IEP identified the predominant behaviors that the IHO found interfered with the student's ability to successfully access and benefit from her special education program (see IHO Decision at p. 27).

The description of the student included in the present levels of social development in the March 2020 IEP indicated that the student demonstrated social anxiety and needed to improve her social skills and her ability to read social cues (Dist. Ex. 26 at p. 7). Additional descriptions of the student's interfering behaviors were included elsewhere in the IEP. Specifically, as reported by the student's then-current private school teacher, the present levels of the student's academic achievement, functional performance, and learning characteristics indicated that, at times, the student was inconsistent in her ability to identify the correct operation to use in math, but was able, with support, to recognize her mistake and make corrections (id. at p. 6). The teacher indicated that the student's inconsistencies with that math concept tended to stem more from her self-doubt at the time rather than her lack of knowledge of the subject matter (id.). Regarding study skills, the IEP reflected that the student was reported to demonstrate inconsistencies with attention span especially when she became anxious about her performance and when she was distracted by the work and speed of her classmates (id.). The student's present levels of physical development noted that the student needed to improve her overall confidence in her handwriting abilities and handwriting assignments, as she frequently sought reassurance throughout sessions and was preoccupied with peers in the classroom, auditory, and visual stimuli (id. at p. 7). The IEP also reflected that the student took medication for ADHD and anxiety (id. at p. 1). In addition, the management needs section of the March 2020 IEP indicated that the student needed to learn effective strategies to manage her attention and anxiety in the classroom and needed to use sensory tools, breaks, and have as few transitions during the day as possible (id. at p. 7). The March 2020 IEP further indicated that the effect of the student's needs on her involvement and progress in the general education curriculum was that the student lacked confidence and exhibited anxiety which negatively impacted her academic success (id.). In addition, the meeting information summary attached to the IEP indicated the difficulties that affected the student's performance socially and academically included, among other things, social anxiety, perspective taking, cognitive flexibility, and nonverbal learning skills (id. at p. 1). Further testimony by the CSE liaison indicated that at the time of the March 2020 CSE meeting the present levels of performance and management needs were updated in line with the neuropsychologist's evaluation and the reports from Aaron staff (Tr. pp. 345-46).

The district's occupational therapist noted in a March 4, 2020 OT summary report that as the task difficulty increased, she presented with "some frustration and anxious behaviors such as picking at the skin on her fingers" (Dist. Ex. 25). The occupational therapist noted in the summary report that the student understood that skin picking could cause harm and that the student tried to stop the picking of her fingers when given a reminder not to do so (id.). In addition, the CSE liaison testified that the March 4, 2020 OT summary report was shared and discussed at the March 4, 2020 CSE meeting, and indicated that the occupational therapist addressed the student's skin picking by using reminders to try to discourage the skin picking and redirecting her (Tr. pp. 400, 404; Dist. Ex. 25).

A review of the March 2020 IEP reveals that the student's skin-picking behavior was not specifically identified in the IEP; however, the hearing record demonstrates that the March 2020 CSE was aware of the behavior and had begun to address it (see Dist. Ex. 26). The CSE liaison stated that she first learned about the student's skin picking by reading the 2019 private neuropsychological evaluation report, which indicated that the student "engaged in compulsive skin picking (on her fingers) to the point of bleeding" and the neuropsychologist had observed that the student had Band-Aids on both thumbs "to treat and prevent" skin picking (Tr. pp. 391, 462; Dist. Ex. 9 at pp. 2, 5). According to the CSE liaison, Portledge staff reported at the January 2020 CSE meeting that the skin picking was a fairly recent behavior and was not something that they noticed much (Tr. p. 391). She testified that skin picking was "definitely discussed" at the March 2020 CSE meeting and the "team" wanted to know what that behavior "look[ed] like" (Tr. pp. 391-92). According to the parent's description, it appeared to be more of an "OCD" behavior because the student would continue to pick at her skin, which was why she needed the Band-Aids (Tr. pp. 393-94). The CSE liaison stated that the parent reported the behavior did not happen that often, rather it "kind of waxed and waned" (Tr. p. 394). Further, the CSE liaison testified that the student's skin picking was not impacting her education while at Portledge (Tr. pp. 462-63).

When asked at the hearing why the skin picking was not reflected in the present levels of performance of the student's March 2020 IEP given that it was discussed at that meeting and was going to be part of the FBA, the CSE liaison indicated that the purpose of the FBA was to find out the function and how often the behavior was occurring and that after the FBA was completed the CSE would have reconvened and updated the IEP (Tr. p. 396).

One of the district's school psychologists testified that, at the March 2020 CSE meeting, Aaron staff presented the CSE with information about the type of program the student attended at Aaron (Tr. pp. 939-40). The student's special education teacher from Aaron discussed the class size, the student's academic functioning, and the student's social/emotional progress in interacting with peers (Tr. pp. 950-51, 961-62). Also, at the March 2020 CSE meeting the student's private neuropsychologist presented information on her skin picking and that this behavior was a result of her "social anxiety" (Tr. pp. 954-55, 1039). The school psychologist testified that at the March 2020 CSE meeting the Aaron special education teacher spoke to the student's skin picking stating that the school was "addressing it within their classroom setting, providing direction for her when that would occur" and that they provided "specific strategies" which were not discussed at the meeting (Tr. pp. 971-72, 998).

The special education teacher of the district's recommended placement testified that at the March 2020 CSE meeting, while the parent and the neuropsychologist's description of the student

indicated that the student still had "tremendous anxiety" as evidenced by her skin picking and being afraid of not having the right answers, that was reported "not so much from the Aaron School," where the student was currently attending (Tr. pp. 662, 669, 734). Her testimony indicated that Aaron staff reported that staying in the same room with the same students all day, eating lunch in the room, not being pulled out, and not having to move around the building helped the student feel comfortable in her classroom at Aaron (Tr. pp. 733-34).

Thus, while the March 2020 IEP present levels of performance did not specifically identify the skin picking as a disruptive behavior, the evidence in the hearing record does not support a finding that the behavior was predominant at the time of the March 2020 CSE. Moreover, the IEP identified the student's underlying anxiety and self-doubt.

The March 2020 IEP also included an annual goal to address the student's social/emotional needs.[20] An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).[21]

The March 2020 CSE reviewed and developed 17 annual goals: one study skills, two reading, five math, two speaking and listening, three speech-language, three motor skills, and one social/emotional/behavioral (Tr. pp. 996-97; Dist. Ex. 26 at pp. 8-9). The annual social/emotional/behavioral goal in the March 2020 IEP addressed increasing the student's ability to display her knowledge of social customs/mores and apply them to three daily life situations (Dist. Ex. 26 at p. 9). The CSE liaison indicated that this referred to typical social behaviors such as maintaining eye contact or shaking hands when greeting someone, maintaining appropriate personal space to another person, or not staring excessively at a person (Tr. pp. 347-48, 414-16). According to the CSE liaison, the annual goal was not in response to the student's skin picking but rather was because of "her social issues, the interactions with peers" and that the student's recommended counseling services and the FBA would address the skin-picking behavior (see Tr. pp. 412-14). However, as the school psychologist pointed out in testimony, that annual goal

[20] As noted above, the IHO's determination about the lack of a social/emotional goal was specific to the January 2020 IEP (see IHO Decision at pp. 17-18); however, a social/emotional/behavioral annual goal was added to the March 2020 IEP (compare Dist. Ex. 13 at pp. 7-8, with Dist. Ex. 26 at p. 9).

[21] Short-term instructional objectives or benchmarks—described as "measurable intermediate steps between the student's present levels of performance and the measurable annual goal"—are required for students who participate in alternate assessment (see 8 NYCRR 200.4[d][2][iv]; see 20 U.S.C. §1414[d][1][A][i][I][cc]; 34 CFR 300.320[a][2][ii]). Although the IHO noted a State regulation indicating that the IEP measurable annual goals should include short term instructional objectives, this student had not been identified as requiring alternate assessments, and therefore, did not require short term objectives to be included in her annual goals (compare IHO Decision at p. 27, with Dist. Ex. 26 at p. 12).

addressed the student's behavior in some capacity, as it was "not a social custom[] to pick your skin" (Tr. pp. 1062-64).

The March 2020 CSE ultimately recommended a 12:1+2 special class placement (Dist. Exs. 26 at p. 10). The school psychologist testified that the program the CSE recommended addressed the student's anxiety in that the smaller class setting, allowed for a smaller teacher to student ratio, and had the support of additional adults in the classroom, for example, teaching assistants, who could assist when the student engaged in behaviors such as skin picking and could provide redirection or any interventions, as well as group counseling (Tr. pp. 1039-40). Also, the student's management needs were to be addressed with sensory tools and breaks (Dist. Ex. 26 at p. 7). In addition, the special education teacher of the recommended placement indicated that—consistent with the March 2020 IEP meeting information summary—it was the district's intention to start the student in a full day of instruction in the special class and transition the student to social studies and science in a general education classroom at a later point, when the student was not struggling with anxiety and transitions (see Tr. pp. 734-39, 2580-82; Dist. Ex. 26 at p. 2). Additionally, the March 2020 IEP included sensory tools and breaks, together with two 30-minute individual sessions of counseling per month, and one 30-minute small group sessions of counseling per week all of which were to address the student's social/emotional/behavioral needs of anxiety and skin picking (Tr. pp. 412, 414, 1039-41; Dist. Ex. 26 at pp. 7, 10).

Based on the foregoing, although the district did not conduct an FBA for the student—opting instead to wait for the student to attend the district program—and the March 2020 IEP does not specifically mention the student's skin-picking behavior, such omissions do not rise to the level of denial of a FAPE as the hearing record reflects that the student's anxiety was identified as a special education need in the IEP present levels of performance, her skin-picking behavior was discussed at the March 2020 CSE meeting, and the student's needs relating to her anxiety were addressed through the recommended 12:1+2 special class placement, IEP management needs, counseling services, and the social/emotional/behavioral annual goal (Tr. p. 397; Dist. Ex. 26 at pp. 7, 10).

4. Transition to the Public School

The IHO found that "[a]ny transition to a new and larger school facility would need to be carefully planned and in great detail, since the [s]tudent had difficulties with transitions" (IHO Decision at p. 28). In addition, the IHO held that since the student had never attended a public school, "with her level of anxiety" she needed a "specific plan to acclimate her" and without such plan he opined that "she would not succeed and would have regressed" which contributed to a denial of a FAPE (id. at pp. 29-30). The district argues that this conclusion was "speculative" and without any basis in the hearing record (Req. for Rev. at p. 3).

Generally, the IDEA does not require a "transition plan" as part of a student's IEP when a student moves from one school to another (A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9 [S.D.N.Y. Oct. 16, 2012], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 505 [S.D.N.Y. 2011]; E.Z-L. v. New York City Dep't of Educ., 763 F. Supp. 2d 584, 598 [S.D.N.Y. 2011], aff'd sub nom., R.E., 694 F.3d

167; see R.E., 694 F.3d at 195).[22] Moreover, review of the March 2020 IEP shows that the CSE was aware that the student needed to "have as few transitions as possible during the day" and that the CSE discussed and had supports in place to assist with the student's transition from Aaron to the district's recommended program (Dist. Ex. 26 at p. 7). The school psychologist testified that at the March 2020 CSE meeting the CSE "anticipated that the student would be coming into the [d]istrict" from the private school and that if that had occurred "numerous things [were] in place to make sure the child [wa]s comfortable" (Tr. pp. 585-86). She stated that staff would meet the student when she arrived to school in the morning, show her around, communicate with the parents about how the student's day was going, ensure that the student was not overloaded with too much information or too many changes at one time, and provide her with any modifications that she may need (id.). Additionally, the March 2020 CSE discussed having the student participate in "the lunch bunch group" and the school psychologist offered to have the student go in and eat lunch with her or other groups, if she was uncomfortable in the larger cafeteria (Tr. pp. 586, 588-89; Dist. Ex. 26 at p. 2). When the student was ready to transition into the mainstream science or social studies class, the CSE planned to have a teaching assistant accompany the student and other students from the special class "to make sure there was a smooth transition into the larger setting" (Tr. pp. 349, 589; Dist. Ex. 26 at pp. 2, 11). Further, in response to the IHO's inquiry about the student's transition from the private school to the public school, the school psychologist testified that the mandated counseling, which included social skills training, was a service the CSE recommended to address that need (Tr. pp. 588-89).

As such, the IHO's finding that the March 2020 CSE was required to develop a specific plan to assist the student's transition to the public school or that the IEP otherwise did not provide supports for that transition is not supported by the evidence in the hearing record.

5. Class Profile

The district asserts on appeal that the IHO erred in finding that the district impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student for the 2019-20 school year by failing to provide the parents a copy of a class profile. The district asserts that the IHO's findings about the class profile "improperly disregard[ed] the law as well as testimony that the [p]arent was provided general information about the particular class recommended for the [s]tudent" and that a tour was scheduled but cancelled due to the COVID-19 pandemic (Req. for Rev. at p. 4).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate

[22] To the extent that the IHO may have been using the wrong terminology and intended to refer to transitional support services, transitional support services are defined by State regulation as "temporary services, specified in a student's [IEP], provided to a regular or special education teacher to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]). However, in this instance, even if the district may have been required to include transitional support services on the student's IEP, such services are designed to support the student's teachers in the classroom and there is no indication in the hearing record that the absence of such services in the IEP may have contributed to a denial of a FAPE.

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

The IHO's finding that the district should have provided the parents with a class profile was rooted in the opinion of the private neuropsychologist that the student needed to be grouped with students with similar "intellectual, social emotional, behavioral and learning needs" given the student's "elevated levels of generalized anxiety and tensions which lead to her skin picking somatic behavior along with her perception of herself and others, all which affect her ability to benefit from her education" (IHO Decision at p. 28; see Tr. pp. 406, 2081, 2145).

Neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and

regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[23] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

The CSE liaison testified that at the March 2020 CSE meeting the parent had questions pertaining to the "types" of other students in the recommended special class (Tr. pp. 361-62). Although no specifics were provided about the other students due to confidentiality, the CSE members described in general that the other students in the class had similar "learning styles and profiles" as the student (Tr. pp. 362, 982-83). Additionally, the director of pupil personnel services testified that "the class makeup was described as it pertained to [the student's] needs" and that the other students had similar needs to the student (Tr. pp. 2538-39, 2579). A tour of the classroom was supposed to occur but due to the COVID-19 pandemic mandated school closures it did not happen (Tr. pp. 362-63, 442, 519).

While the district must implement a student's IEP consistent with the grouping requirements of State regulation, contrary to the IHO's finding, the Second Circuit has held that the IDEA does "not expressly require school districts to provide parents with class profiles" (Cerra, 427 F.3d at 194; see N.K.., 961 F. Supp. 2d at 590 [noting that a district is not required to provide parents with "details about the specific group of children with which their child will be placed"]; E.A.M. v New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012]). Here, concerns about the likelihood that the student would be appropriately grouped with other students are speculative given that the student never attended the assigned public school site (M.C. v. New York City Dep't of Educ., 2015 WL 4464102, at *7 [S.D.N.Y. July 15, 2015]; R.B. v. New York City Dep't of Educ., 15 F. Supp. 3d 421, 436 [S.D.N.Y. 2014], aff'd, 603 Fed. App'x 36 [2d Cir. Mar. 19, 2015]; B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 371 [E.D.N.Y. 2014]; N.K., 961 F. Supp. 2d at 590; see J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *11 [S.D.N.Y. Feb. 20, 2013] [noting that the "IDEA affords the parents no right to participate in the selection of . . . their child's classmates"]). Indeed, claims regarding grouping are inherently speculative as the district cannot guarantee the composition of the class that the student would

[23] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

have attended (M.S. v. New York City Dep't of Educ., 2 F. Supp. 3d 311, 332 n.10 [E.D.N.Y. 2013]; cf. R.E., 694 F.3d at 187, 192 [noting that at the time of the placement decision, a parent cannot have any guarantee that a specific teacher will be available to implement an IEP]).

Based on the foregoing, the IHO's determination that the district impeded the parents' ability to participate by failing to provide them a class profile was erroneous.

C. May 2020 CSE and IEP

1. CSE Composition

Turning to the 2020-21 school year, the IHO determined that it was the district's responsibility to ensure participation of Aaron staff at the CSE meeting and by failing to do so, the district denied the student a FAPE (IHO Decision at p. 43).

Both the IDEA and State and federal regulations specify the individuals required to fully compose a CSE (see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Under State regulations, a CSE is required to include the parents of the student; one regular education teacher of the student if the student is, or may be, participating in a general education environment; one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a school psychologist; a district representative; an individual capable of "interpret[ing] the instructional implications of evaluations results"; a school physician if requested "in writing . . . at least 72 hours prior to the meeting"; an additional parent member if requested "in writing . . . at least 72 hours prior to the meeting"; "other persons having knowledge of special expertise regarding the student"; and "if appropriate, the student" (8 NYCRR 200.3[a][1]; see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; Educ. Law § 4402[1][b][1][a]; see also 8 NYCRR 200.1[pp], [xx], [yy] [defining "regular education teacher," "special education provider," and "special education teacher," respectively, as individuals qualified who are providing instruction or services to the student or who may serve as a teacher or provider to the student]).

Attendees at the May 2020 CSE meeting included the CSE chairperson, a school psychologist, a special education teacher, a regular education teacher, a speech-language therapist, an occupational therapy, a guidance counselor, the principal, the assistant principal, and the student's mother (Dist. Ex. 41). Thus, the CSE included all required members (8 NYCRR 200.3[a][1]).

The CSE liaison testified that private school staff who attend CSE meetings "would have to be invited, and the parent would have to want them invited" (Tr. p. 168). Prior to the March 4, 2020 CSE meeting, the parents emailed the director of pupil personnel services and notified her that the student's private neuropsychologist and Aaron's special education teacher would be joining the meeting by telephone as they had "knowledge and special expertise about" the student (Dist. Ex. 57). There is no indication that the district objected to the parents' requested attendees, and both the private neuropsychologist and the Aaron special education teacher participated in the March 2020 CSE meeting (Dist. Ex. 26 at p. 1). Accordingly, although Aaron staff did not participate in the May 2020 CSE meeting, the evidence in the hearing record shows that the parents were aware of their right to invite non-district individuals to CSE meetings, as they had previously successfully availed themselves of that right (see Dist. Exs. 41 at p. 1; 57).

In view of the evidence above, the parents' claim that the CSE was improperly composed due to the absence of the Aaron staff is insufficient to find a procedural violation. The student's private school teachers are not members of the CSE that are specifically identified in State regulation and further the district was not in a position to compel them to respond or participate in the CSE meetings, quite unlike a school district's obligation to include public or State approved school personnel who are or may become be responsible for implementing the student's public school IEP (see Tr. pp. 168-70). The parents were free to invite the private school teachers as individuals that they deemed to have knowledge or special expertise about the student, and the district would have been required to consider any input they offered during the meeting, had the parents secured their attendance. Accordingly, the parents' claims that the district violated the requirements for including the requisite members of the CSE are without merit. Even assuming that a missing member did amount to a procedural inadequacy, it would not support a finding that the district denied the student a FAPE unless it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Thus, the hearing record does not contain sufficient evidence upon which to base a finding that the student was denied a FAPE based upon the composition of the May 2020 CSE. Additionally, there being no evidence in the hearing record that the parents were precluded from inviting any participants that the parents deemed to have knowledge or special expertise about the student, and the CSE being otherwise properly composed, the IHO erred in finding that it was the district's responsibility to secure the attendance of Aaron staff.

2. Sufficiency of Evaluative Information and Social/Emotional/Behavioral Needs: Consideration of Special Factors (Interfering Behaviors), Present Levels of Performance, and Annual Goals

In connection with the 2020-21 school year, the district argues that the IHO again erred in finding that the district denied the student a FAPE as a result of the district's failure to conduct evaluations previously recommended (i.e., an FBA and an assistive technology evaluation).[24] The district also asserts that that the IHO erred in finding that the May 2021 IEP did not identify the student's social/emotional and behavioral needs or include annual goals to address her behaviors.

By the time of the May 2020 CSE meeting, the district had still not conducted an FBA or an assistive technology evaluation, citing reasons noted above related to the COVID-19 pandemic and, for the FBA, the desire to conduct the assessment once the student was in the environment recommended in the IEP. However, prior to the May 2020 CSE meeting, the district had obtained an audiological evaluation that also evaluated whether the student would benefit from assistive technology in the form of an FM system (see Dist. Ex. 28). In addition, the May 2020 CSE had

[24] Similar to the 2019-20 school, as the parents' allegations in their due process complaint notice relating to the sufficiency of evaluative information was specific to the lack of an FBA and an assistive technology evaluation, the IHO's finding regarding the lack of a classroom observation was outside the scope of the impartial hearing and will not be further discussed.

other current information available to it regarding the student's needs, not the least of which was the March 2020 IEP, developed only two months prior.

Specifically, prior to the May 2020 CSE meeting, the special education teacher of the 12:1+2 special class reached out to the parent to have the student complete an informal assessment (Tr. pp. 662, 668-69; Dist. Exs. 34 at pp. 1-2; 36 at pp. 2-3). The special education teacher testified that she provided an informal assessment to the student as she was aware that the student had anxiety and she wanted to get a "baseline" of where to start in math and reading (Tr. pp. 704-05, 741-43). The assessment was comprised of teacher-made materials that measured "mixed skills and activities" that the special education teacher did in her classroom daily, including completing math facts, simple labeling of coins and bills, generating vocabulary words for writing pieces, and completing reading comprehension questions (Tr. pp. 742-43). The student completed the assessment, and the special education teacher and parent scheduled a telephone call to discuss goals for the student (Tr. pp. 742-44, 746-47; Dist. Ex. 36 at pp. 1-2). According to the special education teacher the student did "quite well" on the assessment, indicating that the special education teacher needed to "up her levels" (Tr. p. 745).

At the May 2020 CSE meeting the CSE had an OT therapy progress summary dated May 12, 2020 and the audiological evaluation report dated March 9, 2020 (Dist. Exs. 28 at pp. 1-2; 38 at pp. 1-3; 41 at pp. 3, 7-8; 62 at pp. 2-3). The May 2020 OT report noted that the student completed the Cogmed program and improved her working memory abilities (Dist. Ex. 38 at p. 1). The occupational therapist continued to recommend OT for the 2020-21 school year to reinforce the strategies learned in the Cogmed program and to generalize those strategies "into her classroom routines" and improve the student's "working memory skills and executive functioning skills" (id. at p. 2). Recommendations for the classroom indicated that the student learned best with a "multisensory approach," practice with concepts prior to the presentation of new material, "small group instruction," breaks, and summer services to prevent regression (id. at pp. 2-3). The occupational therapist also recommended assistive technology for the student to "decrease workload stress and improve functional performance" including programs for "speech to text, word prediction, spell checker, and read aloud features" (id. at p. 2). Additionally, the occupational therapist noted that the student had been introduced to a "typing program" to improve "speed and accuracy" (id. at pp. 2-3). The audiological and FM evaluation completed on March 9, 2020 indicated that the student continued to benefit from the use of assistive listening technology (FM unit) in her educational setting (Dist. Ex. 28 at pp. 1-2). According to the school psychologist, the May 2020 CSE also had a school based counseling report dated May 10, 2020 that she had prepared in anticipation of the student's annual review, in which she indicated that the student had been working on displaying knowledge of social customs and applying them to daily life situations (Tr. pp. 567-68; Dist. Ex. 40). The report also indicated that due to the COVID-19 pandemic the student's "social emotional learning ha[d] been offered remotely," and at that time, the student "had not participated in counseling activities" (Dist. Ex. 40).

According to the May 2020 CSE meeting information summary, the district's "[i]ntermediate team and the middle school team reviewed [the student's] most recent evaluations, teacher reports, progress, OT report, parent input and concerns," in addition to review of the student's "progress, strengths, needs, the remote plan" (Dist. Ex. 41 at pp. 1-2). Aside from the academic information the special education teacher obtained through the informal assessment, the school psychologist testified that the May 2020 CSE did not have updated academic information

(Tr. pp. 1022-23, 1029-30; see Tr. pp. 742-44, 746-47). Comparison of the March 2020 and May 2020 IEPs shows that the academic and social present levels of performance were identical, but for the May 2020 IEP noting the parents' concerns regarding the student's anxiety, executive functioning, and social skills (Tr. pp. 575-76, 578-79; compare Dist. Ex. 41 at pp. 6-7, with Dist. Ex. 26 at pp. 6-7). In the area of physical development, in addition to the information provided in the March 2020 IEP, the May 2020 IEP reflected the May 2020 OT report that the student had completed the Cogmed program and demonstrated an overall improvement in her index score, and that she put forth great effort during OT sessions (compare Dist. Ex. 41 at p. 7, with Dist. Ex. 26 at p. 7; see Dist. Ex. 38). Additionally, the May 2020 IEP reflected that the student needed to continue to improve her working memory skills, generalize strategies and skills learned in the Cogmed program, work on her executive functioning skills and her ability to plan, organize, sequence and execute a plan, and also her keyboarding skills and use of technology programs (Dist. Ex. 41 at pp. 7-8).

Out of 21 annual goals, the May 2020 IEP included three social/emotional/behavioral goals (Dist. Ex. 41 at pp. 8-10). A review of the May 2020 IEP reveals that two additional social/emotional/behavioral goals were added to this IEP as compared to the March 2020 IEP (Dec. 14, 2020 Tr. p. 1026; compare Dist. Ex. 26 at p. 9 with Dist. Ex. 41 at p. 10). According to the school psychologist, each of the annual goals addressed the student's anxiety in general, which in turn affected her skin-picking behavior (Tr. pp. 1027-28, 1062-64). One of the annual goals stated that, when the student expressed a negative emotion at school such as frustration, anger, anxiety, sadness, or impulsivity, she would identify and appropriately use a coping skill, for example, perspective-taking, assertive communication, deep breathing, problem solving, or planned positive activities, to maintain acceptable school behavior (Tr. pp. 1027-28; Dist. Ex. 41 at p. 10). As discussed above, the hearing record describes the student's skin picking as a behavior related to her anxiety, and as such, an annual goal addressing the student's ability to use appropriate coping strategies was appropriate to address and effectively replace the student's use of skin picking as a response to her anxiety (see Dist. Ex. 9 at p. 1, 2). The second new behavioral annual goal on the May 2020 IEP similarly addressed the student's ability to use positive strategies in order to resolve conflicts with peers or adults (Dist. Ex. 41 at p. 10). Here again, this annual goal would allow the student to develop appropriate strategies such as perspective-taking, assertive-communication, problem solving, and seeking appropriate assistance, to be used in anxiety producing situations, such as conflicts with peers or adults, in place of her skin picking behavior (Tr. pp. 1027-28; see Dist. Ex. 41 at p. 10).

Testimony from the school psychologist who attended the May 2020 CSE meeting described the discussions held regarding the evaluative information, parent concerns, and what an appropriate program for the student "would have looked like" (see Tr. pp. 576-83). Based on this information, the CSE recommended a 12:1+1 special class in English, math, science, and social studies with a daily 42-minute 5:1 resource room (Dist. Ex. 41 at p. 11). The school psychologist testified that the resource room service was added for "additional academic support" (Tr. pp. 1028-31). The May 2020 IEP also continued the use of sensory tools and breaks for the student's management needs (compare Dist. Ex. 41 at p. 8, with Dist. Ex. 26 at p. 7). The recommended related services changed from March 2020, and the May 2020 CSE increased the small group speech-language therapy to one 42-minute session every other day; individual OT was modified to two 42-minute sessions per week; and one 60-minute monthly session of individual OT

consultation was added (compare Dist. Ex. 41 at p. 11, with Dist. Ex. 26 at p. 10). The other related services and supplementary aids and services, modifications and accommodations remained the same as the March 2020 IEP (compare Dist. Ex. 41 at pp. 11-12, with Dist. 26 at pp. 10-11).[25] Also, the May 2020 CSE recommended an FM system and 12-month services of two one-hour weekly sessions of resource room (5:1), two 30-minute sessions per week of small group speech-language therapy, and two 30-minute sessions per week of individual OT (Dist. Ex. 41 at p. 12).

Given the above, the hearing record shows that the May 2020 CSE had sufficient evaluative information and discussions about the student's needs even without an FBA or assistive technology evaluation to make a recommendation for the student's program and services. Although the May 2020 IEP present levels of performance maintained the majority of information from the present levels of performance in the March 2020 IEP, the evidence in the hearing record does not suggest that the student's needs changed significantly from March to May 2020 such that the May 2020 IEP no longer accurately reflected the student. Thus, as with the March 2020 IEP, the May 2020 IEP sufficiently identified the student's needs related to anxiety and attention—despite that the IEP did not describe the student's skin picking—and included annual goals and supports targeted to address those needs. Consistent with the finding above regarding the sufficiency of the evaluative information and March 2020 IEP present levels of performance and annual goals, any defect with the evaluative information available to the May 2020 CSE or with the May 2020 IEP present levels of performance or goals does not rise to the level of a denial of a FAPE.

VII. Conclusion

Having found that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2019-20 and 2020-21 school years, the necessary inquiry is at an end and there is no need to reach the issue of whether Aaron was an appropriate unilateral placement for the student or equitable considerations support an award of tuition reimbursement (Burlington, 471 U.S. at 370; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 30, 2021, is modified by reversing those portions which found that the district failed to offer the student a FAPE for the 2019-20 and 2020-21 school years and ordered the district to fund the student's tuition costs at Aaron.

Dated: **Albany, New York**
September 1, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[25] The May 2020 CSE modified the teaching assistant services in the May 2020 IEP to a 5:1 student to adult ratio for electives, lunch, and recess (compare Dist. Ex. 41 at p. 12, with Dist. Ex. 26 at p. 11).