The University of the State of New York

The State Education Department
State Review Officer
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No. 22-059

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

**Appearances:**
MSR Legal & Consulting Services, PLLC, attorneys for petitioners, by Oroma Mpi-Reynolds, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for direct funding and reimbursement for their son's tuition costs at the Rebecca School for the 2021-22 school year. The appeal must be dismissed.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) or a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

## III. Facts and Procedural History

In this case, the student was initially evaluated when he was 18 months old due to a speech delay and, in November 2019, began receiving services of four 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week each of occupational therapy (OT) and physical therapy (PT), and 10-hours per week of applied behavior analysis (ABA) services through the Early Intervention Program (EIP) (Parent Ex. D at pp. 8, 12, 18, 20, 26).

In an October 2020 individualized service plan (IFSP), it was recommended that the student receive related services of two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, ten 60-minute sessions per week of special instruction, and four 30-minute sessions per week of speech-language therapy all in the home beginning in

November 2020 (Parent Ex. C at p. 2). According to the October 2020 IFSP, the ongoing service coordinator discussed the CPSE program with the student's mother, and the IFSP noted that at a later time the service coordinator would follow up with the parents regarding the referral process and transition to other programs (id. at p. 4).

On January 20, 2021, the parents signed consent for an initial evaluation of the student to determine his eligibility for special education services and also provided consent for the evaluation to take place remotely (Dist. Exs. 1; 2). The following assessments were conducted as part of the initial evaluation: a January 2021 social history, a January 2021 psychological evaluation, a February 2021 monolingual educational evaluation, a February 2021 behavioral observation, a February 2021 speech-language evaluation, a February 2021 PT evaluation, and a February 2021 OT evaluation (Parent Ex. D at pp. 6-38).

On March 31, 2021, a CPSE convened to conduct the student's initial review, determine his eligibility to receive special education through the CPSE, and to develop his IEP (Parent Ex. F at pp. 1-24). Finding the student eligible for special education as a preschool student with a disability, the CPSE recommended that the student attend a 12:1+2 special class in an "Approved Special Education Program" and receive two 30-minute sessions per week each of individual speech-language therapy, individual OT, and individual PT; and four one-hour sessions per year of individual parent counseling and training all for the 12-month extended school year along with the provision of specialized transportation (id. at pp. 1, 21-22, 24). The March 2021 IEP indicated that the IEP was projected to be implemented beginning on September 5, 2021 (id. at pp. 3, 21).

After the March 2021 CPSE meeting, the parents developed an annual goals draft review document dated April 13, 2021, in which they provided the district feedback regarding the proposed annual goals (Parent Ex. G). Within that report the parents indicated that they were aware of a scheduled August reconvene meeting of the CPSE, and they noted that there were annual goals they wanted to "flag" as ones to possibly add during the August reconvene if the student had not shown improvement after "having a few more months of EI services" (id. at p. 11).

The CPSE administrator met with the parents on April 16, 2021, with the objective of discussing the IEP annual goals (Tr. pp. 61-63, 226-27, 238, 240-41).[1] At some point thereafter, the family developed another document detailing their stance on evaluations in which they presented specific notes regarding the CPSE evaluations (Parent Ex. K; see Tr. p. 298 [indicating that the document was generated after a meeting in April]).

A May 18, 2021 preschool acceptance letter confirmed that, based on a review of the student's March 2021 IEP, as of September 1, 2021, the ADAPT community network (ADAPT) had the ability to provide the level of service mandated on the student's IEP (Dist. Ex. 14).

The parents chose for the student to continue receiving services through EIP through August 2021 (see Dist. Ex. 12 at p. 8; see also Tr. pp. 171-73).[2]

[1] A new IEP was not generated at the April 2021 meeting.

[2] Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C.

On or about August 3, 2021, a contract was executed between the parents and the Rebecca School for the student's attendance during the 2021-22, 10-month, school year which was to begin on September 13, 2021 (Parent Ex. J).

The district conducted an evaluation of the student's assistive technology needs, remotely, on August 4, 2021 (Dist. Ex. 12). Based on the results of the evaluation, the evaluators recommended assistive technology for the student in the form of an iPad mini with the LAMP communication application and amplification case (id.).

At some point during summer 2021, it appears that the parents moved to a new home address within a different "Home District" (compare Parent Ex. F at p. 1, with Parent Ex. A at p. 1, and Parent Ex. R at p. 1).[3]

In a letter dated August 27, 2021, the parents notified the district that they disagreed with the CPSE process and with the CPSE's resulting program and placement recommendations for the student for the 2021-22 school year and advised the district of their intent to place the student at the Rebecca School beginning September 13, 2021, and seek public funding for the costs of such unilateral placement (Parent Ex. A).

On August 19 and August 30, 2021, a CPSE from the district to which the parents had relocated convened to review the student's IEP for the 2021-22 school year (Parent Ex. R).[4, 5] Finding the student continued to be eligible for special education as a preschool student with a disability, the CPSE recommended that the student receive 10 hours per week of special education itinerant teacher (SEIT) services in a group of two, three 45-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, four 60-minute sessions per year of group parent counseling and training, and assistive technology of an iPad with the support of a communication application

§ 1432 [5][A]; 34 CFR 303.21[a]); however, State law provides that children in EIPs who are evaluated by the district's CPSE before their third birthday and found to be eligible for preschool educational services under the IDEA, and turn three years of age on or before the last day of August, are eligible to continue receiving early intervention services until the first day of September of the same calendar year (see Pub. Health Law § 2541[8][a][i]). The student turned three after the March 2021 CPSE meeting finding his eligible for special education as a preschool student with a disability but before August 31, 2021 (see Parent Ex. F at p. 1).

[3] To be clear, it appears that the parents moved from one region within the school district to another, not to a different school district.

[4] Originally, the August 2021 IEP was marked as district exhibit 15; however, during the impartial hearing, the district opted not to offer the IEP into evidence (see Tr. pp. 35, 157-58). Later, the parents offered the IEP into evidence as parent exhibit R (Tr. pp. 256-59). The exhibit included in the hearing record filed with the Office of State Review was not re-labeled as parent exhibit R; however, for purposes of this decision, it is cited as such.

[5] An attendance page attached to the August 30, 2021 IEP indicated that an additional CPSE meeting was held on August 19, 2021 (Parent Ex. R at p. 15). The CPSE administrator who attended the August 2021 CPSE meetings and who also served as the special education teacher/related services provider was a different individual than the CPSE administrator who attended the March 2021 CPSE meeting and testified at the impartial hearing (compare Parent Ex. R at pp. 15-16, with Tr. p. 39, and Parent Ex. F at p. 2). Within this decision, references to the "CPSE administrator" refer to that individual who attended the March 2021 CPSE meeting unless otherwise specified.

for use in school and in the home all for the 12-month extended school year (id. at pp. 1, 10-11).[6] The IEP identified the location for the recommended services as an early childhood center selected by the parents (id. at pp. 10-11). The August 2021 IEP indicated that the projected date for implementation of the IEP was September 13, 2021 (id. at pp. 2, 10-11).

The student began attending the Rebecca School on September 13, 2021 (Parent Exs. O; Q at p. 1).

**A. Due Process Complaint Notice**

By due process complaint notice dated September 13, 2021, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. B). The parents contended that the district failed to evaluate the student in all areas of suspected disability by failing to use a variety of assessment tools and strategies which left the CPSE without the "imperative" information it needed to develop appropriate IEPs (id. at p. 4). The parents alleged that the district failed to convene a timely CPSE meeting by not arranging for the student's services to begin within 60 days of the date that the parents signed the evaluation consent form and that the CPSE was not properly composed (id.). The parents also contended that the district failed to implement an IEP for the 2021-22 school year by not having an IEP in effect at the start of the school year and also failed to offer an appropriate program and placement as the student's profile warranted a specialized and supportive educational environment (id.). The parents further alleged that the district failed to develop appropriate measurable annual goals that were clear and concise, addressed the student's "true" deficits, and provided appropriate support for the student to meet his goals (id.). The parents argued that the district failed to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP) (id.). The parents also argued that the district failed to provide or offer: behavior therapy or other psychotherapeutic services; specialized and individualized paraprofessional services; appropriate social skills instruction or training; appropriate individual or group speech-language therapy; appropriate instruction in sensory regulation and activities of daily living, and individual or group OT aimed at developing functional skills and sensory regulation; appropriate PT to address the student's sensory needs; appropriate parent counseling and training; appropriate and customized assistive technology; and other appropriate developmental or corrective support services, such as therapeutic recreation, and consistent adapted physical education (id. at pp. 6-7).

In addition, the parents contended that the district failed to recommend special transportation services (Parent Ex. B at p. 7). The parents further allege that the district failed to timely implement the student's IEP for the 2021-22 school year because, as of the date of the filing of the due process complaint notice, no final notice of recommendation (FNR) or prior written notice of the student's final placement recommendation had been issued (id.). Additionally, the parents argue that the district's failure to provide adequate prior written notice prevented the parents from meaningfully participating in the CPSE process resulting in denial of a FAPE to the student (id. at p. 8). As relief, the parents sought: prospective funding of tuition and related services and fees at the Rebecca School; reimbursement of all monies paid to the Rebecca School

[6] A recommendation for PT services does not appear on the summary page of the August 2021 IEP; however, PT is a recommended service appearing in the "Recommended Special Education Programs and Services" section of the August 2021 IEP (Parent Ex. R at pp. 1, 10-11).

including credit card and loan interest charges related to the tuition deposit; roundtrip mileage or MetroCard fare for a parent to transport the student to and from the Rebecca School; a recommended augmentative and alternative communication (AAC) device, "to wit, an iPad mini Wi-Fi 64GB" for use at school and home; a CPSE reconvene to review and consider a pending neuropsychological evaluation and amendment of the IEP accordingly; and prospective payment and/or reimbursement of the cost of school meals including daily breakfast and lunch (id.).[7]

**B. Impartial Hearing Officer Decision**

A pre-hearing conference was held on February 9, 2022, and the parties convened for the evidentiary phase of the impartial hearing on March 9, 2022, which concluded on March 10, 2022 (Tr. pp. 1-327).

By decision dated April 10, 2022, the IHO concluded that, since the impartial hearing was limited to the issues raised in the parents' due process complaint notice, any issues not contained within the four corners of the complaint were not considered (IHO Decision at pp. 8-9). Further, the IHO found that the allegations in the complaint were specific and only related to the March 2021 IEP (id.).[8]

Turning to the parents' claim that the March 2021 CPSE was not properly constituted because there was no school psychologist present to interpret the student's evaluations, the IHO found that the March 2021 CPSE was validly composed in the absence of a school psychologist, which the IHO noted was only a requirement for a proper CSE composition and not a CPSE (IHO Decision at pp. 9-10). Here, the IHO found that the March 2021 CPSE composition included both parents, the parents' attorney, an EIP provider of ABA services to the student, the CPSE administrator, a chairperson, and an evaluation representative to interpret the implications of the evaluation results (id.).

Next, the IHO addressed the parents' claim challenging the appropriateness of the March 2021 CPSE's recommendation for speech-language therapy twice a week when the student received speech-language therapy four times per week in early intervention (IHO Decision at p. 10). The IHO found the testimony of the district CPSE administrator credible in that she explained that, rather than experience a reduction in speech-language therapy, the student would be in a "complete learning environment that would assist in enhancing this aspect of his disability together with individual [speech-language therapy] at pre-school" (id.). The IHO then addressed the parents' contention that the March 2021 IEP was inappropriate because it lacked a recommendation for assistive technology (id. at pp. 10-11). The IHO noted that, after the parents expressed concern at the March 2021 IEP meeting, a remote assistive technology evaluation was conducted on August 4, 2021, recommending the student receive a dynamic display speech generating device, such as an iPad mini with the LAMP communication application and amplification case (id. at p. 11). The

[7] The parents withdrew all requests for relief at the impartial hearing with the exception of direct funding and reimbursement of tuition (Parent Mem. of Law at p. 4).

[8] The IHO further found that the parents unilaterally placed the student in July 2021, the March 2021 IEP was "finalized on April 14, 2021," and that the parents did not challenge the August 2021 IEP (IHO Decision at p. 18).

IHO found that the student had an AAC device through the EIP and since the parents opted to continue the student in the EIP until September 2021, the lack of an assistive technology evaluation or recommendation for an assistive technology device at the March 2021 IEP meeting did not constitute a denial of FAPE for the 2021-22 school year (id.).[9] Regarding the parents' claim that at the March 2021 IEP meeting the CPSE should have recommended a one-to-one paraprofessional for the student, the IHO found the district's testimony credible that the CPSE members at the March 2021 IEP meeting, including the student's ABA provider, did not find a medical or private need for a paraprofessional (id.).

Next, the IHO addressed the parents' claim challenging the appropriateness of the March 2021 IEP based on the interpretation of the benchmarks on which the student's goals were based, the learning standards or framework used, and the substantive quality of the goals as related to the student's needs (IHO Decision at pp. 12-13). Here, the IHO found that the March 2021 IEP "accurately identifie[d] the student's ongoing needs pursuant to the findings of the core evaluations and [set] reasonable goals" (id. at p. 12). The IHO noted that the goals in the IEP were matched to the results of the relevant evaluations (id. at p. 14).[10] The parents had alleged that the district failed to recommend PT; however, the IHO found the March 2021 IEP did in fact recommend individualized PT twice a week for 30 minutes (id. at p. 13). In addition, the IHO found the parents' claim that the district failed to recommend transportation was without merit as the March 2021 IEP included transportation (id.). With regard to the parents' claim that the district failed to create an FBA and BIP, the IHO found that an FBA was not conducted for the student as there were no concerns regarding his behavior (id.).[11]

Next, the IHO addressed the parents' claim that the CPSE failed to timely convene to develop the student's IEP for the 2021-22 school year. The IHO noted that the parents signed evaluation consent forms for the student on January 20, 2021, and the CPSE meeting was held on March 31, 2021 (IHO Decision at p. 14). The IHO found that CPSE meeting exceeded the 60-day requirement, per 8 NYCRR 200.16(f)(1), by 10 days. (IHO Decision at p. 14). Nevertheless, the IHO found that the 10-day delay did not impede the student's right to a FAPE as the parents opted for the student to keep receiving services through the EIP until September 2021 (id.). The IHO also found that, even though the district failed to send a prior written notice to the parents, the parents were advised of their due process rights and had adequate opportunity to participate in the

[9] The IHO rejected the parents' argument that the findings of the assistive technology evaluation would require them to revisit preschools with the new information as the student already had an assistive technology device that he was familiar with and he was remaining in the EIP until September 2021 (IHO Decision at p. 11). The IHO further noted that the parents' argument was unsound because they had already enrolled and paid the non-refundable enrollment fee for the Rebecca School on July 30, 2021, before the assistive technology evaluation was conducted (id.).

[10] The IHO found that interpretation of the benchmarks, the learning standards, and the substantive quality of the goals as related to the student's needs were to be resolved by trained educators not the courts (IHO Decision at p. 14).

[11] The IHO noted that the parents did not include any argument about the lack of an FBA and BIP in their post-hearing brief (IHO Decision at p. 13).

development of the student's IEP (id. at p. 15).[12] Therefore, the IHO found that the district met its burden of establishing that the student was provided a FAPE with the placement and program it offered in its March 2021 IEP (id.).

Finally, the IHO found that the district demonstrated that the offered program and "placement" was appropriate, "the placement had a space available for the Student," and, therefore, the district satisfied its burden to prove that it offered the student a FAPE (id. at p. 19).

The IHO denied the parents' claim for reimbursement and direct funding to the Rebecca School (IHO Decision at p. 19).

**IV. Appeal for State-Level Review**

The parents appeal asserting that the IHO erred in accepting and relying on a "so-called 'Four-Corners' argument" where the parents were held to a "higher standard of particularized facts in a due process pleading," when all that was required was "a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem" pursuant to regulation. Next, the parents claim that the IHO "faulted" the parents for exercising their right under Public Health Law § 2541 to maintain the student in his EIP until end of August 2021, as the district was "still responsible for ensuring an appropriate IEP and implementation" upon the student's completion of his EIP. The parents argue that the IHO erred in concluding that the district met its burden of proving that the CPSE was properly constituted, as the district presented no witness or documentary evidence from the individual who "purportedly" was qualified to interpret the instructional implications of the student's evaluations. The parents further contend that the IHO erred in affording "undue weight" to the CPSE's evaluations, which the district "failed to defend as appropriate" and, instead, advised the parents to "seek additional and independent educational evaluations." Additionally, the parents assert that the IHO erred in relying on retrospective evidence about the learning environment that the student would have attended "to bolster an inadequate IEP" with respect to speech-language therapy.

Further, the parents allege that the IHO erred in finding that the district met its burden "even in the absence of a Prior Written Notice/Final Notice of Recommendation." Next, the parents claim that the IHO erred in failing to consider all the evidence in the hearing record by failing to analyze the appropriateness of all of the district's recommendations for the 2021-22 school year stemming from three separate CPSE meetings. The parents argue that the IHO faulted them for reserving a seat for the student at the Rebecca School in the absence of an FNR or prior written notice from the district. The parents assert that the IHO erred in her analysis of the parents claim with respect to a "one-to-one paraprofessional, [a]ssistive [t]echnology, FBA and BIP, transportation, and IEP goals, as explained in further detail in their Memorandum of Law." The parents also assert the IHO erred in not finding that the Rebecca School was an appropriate unilateral placement and that equitable considerations weighed in favored of the parents' request

[12] Determining that the parents were not denied the right to meaningful participation in the IEP process, the IHO found that the parents were advised of their due process rights during the referral process, were sent a copy of the procedural rights, and their attorney was present during the IEP meeting (IHO Decision at pp. 14-15).

for relief. The parents request tuition reimbursement and direct funding for the student's attendance at the Rebecca School for the 2021-22 school year.

In an answer, the district responds to the parents' request for review by generally denying the material allegations therein and requests that the parents' appeal be dismissed. Initially, the district argues that the March 2021 IEP meeting was held "well within" 60 school days of the receipt of the parents' consent and was finalized with a placement recommendation "well before" the start of the school year in September 2021, and that by obtaining the parents' consent for the student to continue receiving services through the EIP, the district was in compliance with the 60 school-day deadline. However, the district argues that the parents' contention that the IHO erred in determining that the IEP was late, but that it did not amount to a deprivation of FAPE, should not be considered as it was raised solely in the parents' memorandum of law. The district asserts that the CPSE team was properly constituted, particularly in that it included a special education teacher as well as members who were qualified to interpret the student's evaluations. Next, the district argues that the March 2021 CPSE team had an abundance of evaluative data in developing the student's IEP and used data and testing scores from the evaluations to assess the student's deficiencies and needs, and further that the IHO correctly found that the March 2021 IEP accurately captured the student's needs as reflected in the evaluations. The district asserts that parents' arguments that evaluative data was not accurate because some of it was not based on standardized testing and the use of remote evaluations, are only alleged in the parents' memorandum of law and are without merit. The district further asserts that the IHO correctly determined that the March 2021 IEP was the operative IEP as the parent enrolled the student at the Rebecca School about a month prior to the August 2021 IEP and secured the placement with a deposit, and further that the IHO found the parents failed to raise any claims against the August IEP in their due process complaint notice.

With respect to the parents' IEP claims, the district asserts that: the March 2021 IEP goals were sufficiently crafted to meet the student's needs; the student's related services recommendations including speech-language were appropriately formulated and reflected the results of pertinent evaluations; the student did not require a 1:1 paraprofessional, an FBA and a BIP, or assistive technology; any failure of ADAPT to offer parent counseling and training was not raised in the request for review but, in any event, would only amount to a procedural violation that does not rise to the level of a denial of a FAPE; and that the parents waived their transportation claims at the impartial hearing. The district further asserts that the district's identification of ADAPT as the location where the student could receive the program and services recommended in the March 2021 IEP was timely and in accord with FAPE requirements, as ADAPT had a placement available for the student and offered a "language-rich environment" for students who were "very bright" but needed a "big push in communications." With respect to the parents' argument that testimony on this topic violated the proscription on impermissible retrospective evidence, the district asserts that the purpose of the testimony was to show the district could implement the student's IEP, particularly with respect to addressing the student's language-based deficiencies, rather than to bolster an inadequate IEP. Regarding the parents' argument that the IHO applied an "overly strict 'four corners' standard," the district asserts that the IHO was merely saying that all issues must be raised in the due process complaint notice. Finally, the district argues that the IHO correctly did not reach the question of the appropriateness of the Rebecca School or weigh equitable considerations as the district offered a FAPE. The district also asserts that the SRO should not consider additional evidence, which the parents offered with their request for

review, because it could have been presented at the time of the impartial hearing and the parents failed to sufficiently explain why it was important.[13]

In a reply, the parents respond to the district's answer.[14]

## 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

[13] The parents submit additional evidence with their request for review (Req. for Rev. Exs. S-Y; see Parents Aff. of Service). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Proposed parent exhibits T through Y were available at the time of the impartial hearing and are not necessary in order to render a decision in this appeal. The affidavit submitted in support of the parents' request that the additional evidence be considered is also unnecessary.

[14] The practice regulations permit a reply of up to 10 pages with an accompanying memorandum of law in support of a reply of up to 10 pages; the practice regulations do not contemplate that the documents be merged (8 NYCRR 279.8[b]). The parents' "Verified Reply with Memorandum of Law" is 21 pages long, impermissibly merging the two documents and exceeding the combined permissible page limitations.

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]).[15]

[15] 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

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

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

## VI. Discussion

### A. Operative IEP and Scope of the Impartial Hearing

In connection with the 2021-22 school year, two IEPs were developed for the student. The first on March 31, 2021, and second on August 30, 2021 (see Parent Exs. F; R). The parents claimed to have received the March 2021 IEP on April 14, 2021, a day after sending the CPSE administrator a letter providing feedback regarding the recommended annual goals as they appeared in the March 2021 IEP (Tr. pp. 238-39; Parent Ex. G).[16] Then, the parents met with the CPSE administrator on April 16, 2021, with the understanding that they would discuss the recommended goals in the March 2021 IEP in the light of their feedback letter (Tr. pp. 61-63, 226-27, 238, 240-41). After the parents moved to a different region in the district, a CPSE convened on August 19 and August 30, 2021, to review the student's IEP for the 2021-22 school year (Parent Ex. 15).[17]

The parents contend that the IHO erred in failing to consider evidence stemming from all of the CPSE meetings and both the March 2021 and August 2021 IEPs and argue that the March 2021 IEP was not the final IEP. The district argues the IHO correctly determined that the March 2021 IEP was the operative IEP for the 2021-22 school year because, "[a]s the IHO found . . . , about a month before the August [2021] IEP date the [p]arent[s] enrolled the student at Rebecca,

chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

[16] The parent testified that the IEP sent to them by the district on April 14, 2021, did not incorporate any of the feedback they provided to the district regarding the annual goals in the student's March 2021 IEP (Tr. pp. 238-40).

[17] The student's father testified that, at the August 19, 2021 CPSE meeting, the parents' feedback about the annual goals and some of their objections with regard to the March 2021 IEP, including the parents' request for a paraprofessional, were discussed (Tr. pp. 250-52).

securing the [s]tudent's placement" and the parents failed to raise any claims about the August 2021 IEP in their due process complaint notice (Answer ¶ 10).

The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., , 173 [2d Cir. 2021]). There is some authority that indicates that a later-developed IEP is operative that has arisen from circumstances where a school district attempts to defend an IEP developed later (usually after the beginning of the school year) that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (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" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [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).

Here, even though the August 2021 IEP was developed after the parents took steps to effectuate their unilateral placement of the student at the Rebecca School, such as entering into an enrollment contract with the Rebecca School and providing the district notice, dated August 27, 2021, of their intent to unilaterally place the student (see Parent Exs. A; J), the district still had the opportunity to change the IEP recommendations. In particular, the Second Circuit recently emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

Given the date of the parents' August 27, 2021 letter to the district (Parent Ex. A), the August 30, 2021 CPSE took place prior to the expiration of the 10 day period (see Parent Ex. R). Further, as of the date of the August 30, 2021 CPSE meeting, the projected implementation date of the March 2021 IEP (September 5, 2021) had not yet come to pass (see Parent Ex. F at pp. 3, 21). In addition, the parents did not file their due process complaint notice until and the student did not begin attending the unilateral placement September 13, 2021 (Parent Exs. B; O; Q at p. 1).

Finally, the development of the August 2021 IEP was consistent with the intentions communicated to the parents by the district. The CPSE administrator testified that she told the parents that, because the student could continue to receive services through the EIP, the CPSE would "meet again" at which time "the final determinations for September placements" would be

completed (Tr. p. 62). The CPSE administrator explained that every student who stayed with the EIP had a subsequent CPSE meeting to evaluate progress reports and results of any new evaluations (id.).

Because the August 2021 IEP was developed within the 10 day notice period and prior to the projected implementation date of the IEP for the 2021-22 school year, I find that the IHO erred in not considering the August 2021 IEP to be the student's operative IEP for the 2021-22 school year. With that said, the conduct of the March 2021 and August 2021 CPSE meetings are relevant to the analysis of the district's offer of a FAPE to the student for the 2021-22 school year (see Application of a Student with a Disability, Appeal No. 16-035).

Generally, it is unclear why the district avoided defending the August 2021 IEP at the impartial hearing. Similarly, it is unclear why the parents argue in favor of the August 2021 CPSE process and IEP being considered given that the parents' allegations on appeal focus on their disagreements with the March 2021 CPSE process. In their memorandum of law, the parents seem to argue that they should prevail since the district failed to defend the August 2021 IEP during the impartial hearing. The IHO found that the parents' due process complaint notice directed allegations solely at the March 2021 IEP (IHO Decision at pp. 8-9). On appeal, the parents argue that this was an overly restrictive reading of the requirements.

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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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]).

The parents' due process complaint notice sets forth a "developmental and educational history" which summarized events through August 27, 2021, when the parents sent their 10-day notice to the district but made no mention of the August 2021 CPSE meetings or IEP (see Parent Ex. B at pp. 1-4; see also Parent Ex. A at p. 1). There is no other mention of the August 2021 CPSE meetings or IEP within the due process complaint notice (see Parent Ex. B). To be sure, several of the parents' allegations are broadly stated as relating to the district's CPSE process and recommendations for the 2021-22 school year (id. at pp. 4-8). However, to the extent the district successfully defended aspects of the March 2021 IEP and those aspects did not change in the August 2021 IEP, the parents' attempt to rely on the district's failure to meet its burden falls flat. More glaringly, on appeal, the parents' arguments relating to the substantive recommendations for the student fail because the parents did not pursue them in their request for review. And it is to this examination of the scope of review that I now turn.

**B. Scope of Review**

Turning to the parent's substantive IEP claims, a determination must be made regarding which claims are properly before me on appeal. 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]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Section 279.8 requires that a request for review shall set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(8 NYCRR 279.8[c]).

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]).

Here, at least with respect to the their claims directed at the adequacy of the student's IEP(s), the parents' request for review fails to fully comply with these requirements as the parents have not delineated claims pursuant to the practice regulations but rather have briefly and in wholly conclusory fashion alleged that the IHO erred in her determinations concerning paraprofessional support for the student, assistive technology, the lack of an FBA and BIP, special transportation, and IEP annual goals. On these issues, the request for review states in full: "[t]he IHO erred in her analysis of the [parents'] claims with respect to a one-to-one paraprofessional, Assistive Technology, FBA and BIP, transportation, and IEP goals, as explained in further detail in their Memorandum of Law" (Req. for Rev. ¶ 9). This allegation is not in compliance with the practice regulations as it does not separately number or provide a clear and concise statement of the issues

regarding paraprofessional support, assistive technology, the need for an FBA and BIP, transportation, and IEP annual goals, including identification of the IHO's precise rulings or failure to rule on these issues, and fails to allege "grounds for reversal or modification" of the IHO's determinations (8 NYCRR 279.4[a], 279.8[c][2]). Additionally, this section of the request for review fails to identify relevant citations to the hearing record in support of the parents' allegations or the relevant page numbers of the IHO's decision and simply refers the SRO to the memorandum of law for further detail (8 NYCRR 279.8[c[3]; Req. for Rev. ¶ 9). This is notwithstanding that the parents utilized only five of the ten permissible pages for setting forth their claims in a request for review (8 NYCRR 279.8[b]). Further, incorporation by reference is specifically prohibited by the practice regulations (8 NYCRR 279.8[b]), and, as a general matter, it has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at *11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070). Thus, any arguments included solely within the memorandum of law have not been properly raised.[18]

In any event, I have conducted an independent review of the record and find no reason to disturb the IHO's determinations, which found no merit to the parents' claims that the district failed to offer the student a FAPE for the 2021-22 school year. Notwithstanding that they are inadequately raised, some discussion of the IHO's findings regarding assistive technology and the lack of an FBA are discussed below out of an abundance of caution.[19] What stands out regarding the parents' challenges or attempts to challenge the programming for the student for the 2021-22 school year is that they have not alleged that the substantive recommendations of the August 2021 CPSE, including SEIT and related services failed to offer the student a FAPE.[20, 21] The parents'

[18] Likewise, other than in the memorandum of law, the parents have failed to raise allegations on appeal regarding their claims that the district failed to timely convene the student's initial eligibility determination (March 2021 IEP) within 60 days of receipt of consent to evaluate or that the student's sensory needs were insufficiently addressed in the IEPs. The parents failed to delineate these as issues on appeal in their request for review (see generally Req. for Rev.). Accordingly, they will not be addressed.

[19] Further, even had I considered the further elaboration on the parents' arguments regarding paraprofessional support, transportation, or annual goals included in the memorandum of law, the parents have not raised any persuasive basis for disturbing the IHO's findings on these claims.

[20] Even the parents' arguments in the memorandum of law about the annual goals do not go so far as to allege that the annual goals included in the August 2021 IEP were inappropriate: instead, focusing on the March 2021 IEP (Parent Mem. of Law at pp. 9, 24). During the impartial hearing, the student's father testified that the August 2021 CPSEs discussed the parents' feedback to goals and made changes based thereon (Tr. pp. 251-52). Thus, it at least seemed that the August 2021 IEP satisfied some of the parents' concerns in that area.

[21] The parents' allegation in the request for review alleging that the IHO erred in relying on retrospective testimony alludes to the IHO's determination regarding the speech-language therapy recommended in the March 2021 IEP (see IHO Decision; Req. for Rev. ¶ 5). Initially, although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written

main arguments on appeal are technical or procedural in nature. It is to the procedural challenges that I now turn.

### C. CPSE Process

#### 1. CPSE Composition

The parents contend that the IHO erroneously concluded that the district met its burden of proving a properly constituted March 2021 CPSE,[22] when in fact, the district presented no witness or documentary evidence from the individual who was qualified to interpret the instructional implications of evaluative data as mandated. The hearing record does not support this position.

The IDEA and State regulations require a CPSE to include the following members: the parents; a regular education teacher of the student (if the student was, or may be, participating in the regular education environment); a special education teacher of the student or special education provider of the student; a district representative (who serves as the chairperson of the committee); an individual capable of interpreting instructional implications of evaluation results (who may be the regular education teacher, special education teacher or provider, district representative, or a school psychologist); and other persons having knowledge or special expertise regarding the student as designated by the parents or district (20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][2]).

The CPSE administrator, who attended the March 2021 CPSE meeting, testified that her duties and responsibilities included reviewing evaluations, guiding parents through the referral process, implementing IEPs, and supervising the provision of those IEPs (Tr. pp. 40-41; Parent Ex. F at p. 2). She further explained that her role as district representative on the CPSE included assessing evaluation agencies and "going over the evaluations," guiding and facilitating the meeting, asking questions to elicit input from teachers and parents and the other participants, determining if the student was eligible, and facilitating a recommendation of services (Tr. p. 42). The CPSE administrator stated, and the March 2021 IEP attendance page confirmed, that in addition to herself the March 2021 CPSE included both parents, the student's ABA provider from

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plan or prevent the parents from making an informed decision]). The testimony relied upon by the IHO was of the latter variety, describing the recommended program (see Tr. pp. 53-54) and also appears to accurately capture the distinction between services through the EIP versus the CPSE. That is, as State guidance notes, the EIP "focuses on enhancing the development of infants and toddlers with disabilities, and minimizing their potential for developmental delay" and their "need for special education services when children reach school age," whereas preschool special education "focuses on children's educational needs," such as ensuring access to the general curriculum for all children" ("The Transition of Children from the New York State Department of Health Early Intervention Program to the State Education Department Preschool Special Education Program or Other Early Childhood Services," at p. 3 [DOH & VESID Feb. 2005], available at https://www.p12.nysed.gov/specialed/publications/preschool/transitionguide/transitionguidance.pdf). More to the point, however, the August 2021 IEP increased the recommended speech-language therapy services (compare Parent Ex. R at p. 10, with Parent Ex. F at p. 21), and the parents have not challenged the new recommendation (see Tr. p. 252).

[22] While the parents do not indicate within their request for review to which CPSE meeting they are referencing, they do cite to portions of the hearing transcript, wherein the witness testified regarding the composition of the March 2021 CPSE and I note the parents make no specific argument with respect to the August 2021 CPSE meetings within their request for review (Req. for Rev. ¶ 3, citing Tr. p. 72).

early intervention, the service coordinator from early intervention, the family's legal representative, and a representative from the agency that conducted the evaluations, and she noted that the "evaluation representative" interpreted the results of the evaluations (Tr. pp. 42-43, 72; see Parent Ex. F at p. 2).

The CPSE administrator acknowledged that there were no related service providers present at the March 2021 CPSE meeting and indicated that the speech-language therapy recommendation, included on the student's IEP, was determined by the team, the parents, and the evaluation results (Tr. p. 74). In addition, the CPSE administrator stated that there was not a psychologist present at the March 2021 CPSE meeting, but she noted, as detailed above, that for a CPSE meeting a psychologist was not a mandated member (Tr. p. 72; see 8 NYCRR 200.3[a][2]).

Even assuming that the hearing record was lacking in detail regarding the identity or qualifications of the "evaluation representative," the CPSE administrator could also have filled that role (see Tr. p. 42; see also 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][2]). Overall, the parents' argument is technical in nature and they do not otherwise allege with any particularity under these facts how the composition of the CPSE significantly impeded their ability to participate in the development of the student's educational program or deprived the student 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]). Absent some argument for how this purported deficiency in the composition of the CPSE harmed the student or the parents' ability to participate in the March 2021 CPSE meeting, the hearing record does not support a finding of a denial of a FAPE on this basis (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 279-80 [S.D.N.Y. 2013]).

Thus, a review of the hearing record supports the IHO's finding that the March 2021 CPSE was validly constituted.

**2. Sufficiency and Consideration of Evaluative Information**

Next, the parents argue that the IHO erred in affording undue weight to the evaluations relied upon by the CPSE, which the district itself failed to defend as appropriate to the extent that the district CPSE administrator advised the parents to seek independent educational evaluations (IEEs) (Req. for Rev. ¶ 4).

With respect to preschool students with disabilities, State regulation requires a parent to select an "approved program with a multidisciplinary evaluation component to conduct an individual evaluation"—as defined in 8 NYCRR 200.1(aa)—and the completion of a "summary report" that must include a "detailed statement of the preschool student's individual needs, if any" (8 NYCRR 200.16[c][1]-[c][2]).

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]; see 8 NYCRR 200.1[aa]). A CSE or CPSE 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]). With respect to preschool students with disabilities, State regulation requires a parent to select an "approved program with a

multidisciplinary evaluation component to conduct an individual evaluation" and complete a "summary report" that must include a "detailed statement of the preschool student's individual needs, if any" (8 NYCRR 200.16[c][1]-[2]).

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

**a. Evaluation Summaries**

As noted earlier, a number of assessments were administered in January and February 2021 as part of the student's initial preschool evaluation (see Parent Ex. D at pp. 6-38).

According to the January 2021 social history evaluation report, the parents indicated that the student's motor milestones were attained within normal time frames; however, they also reported at the time that the student could not jump with two feet together, sometimes alternated feet when climbing or descending stairs, and had inconsistent balance and coordination as he sometimes tripped and fell and leaned forward when walking and running (Parent Ex. D at p. 7). The parents reported that the student began babbling before his first birthday, lost language at 14-15 months, by the age of two was speaking with one-word utterances, and that his vocabulary was limited to babbling "momma" and "dadda" which were typically not used in context (id.). The student's nonverbal communication was marked by pointing, taking his parent by the hand, and using a communication device (id. at p. 8). The parents stated that the student followed simple one-step directions if his mood allowed but could not answer wh-questions or state his name or age (id. at pp. 7-8). Regarding social/emotional functioning, the student was described as an energetic, kind, and stubborn boy who typically preferred solitary play and had displayed parallel play in presence of peers (id. at p. 8). According to the parents, the student had a good appetite but was a picky eater, could feed himself with assistance, could not dress or undress himself, could turn book pages one by one, and could stack blocks, complete puzzles, and unwrap small objects, and the report noted that the toilet training process had begun but had been met with resistance (id.). The parents indicated that the student had been recommended to see an optometrist for near-sightedness but had not yet been formally evaluated due to the COVID-19 lockdown and also noted that the student had reduced hearing in his right ear and "tubes" had been recommended (id.). In addition, the social history evaluation report indicated that the student had been diagnosed as having an autism spectrum disorder and had not yet been enrolled in school or daycare (id. at p. 9).

As part of the January 2021 psychological evaluation report, the evaluator stated that the student's general cognitive ability was not determined due to incomplete subtests, secondary to the nature of the remote assessment, and that the student's general cognitive ability was suspected to fall within the below average range (Parent Ex. D at p. 13). With respect to assessments of adaptive behavior, the evaluator found the student's overall level of functioning fell in the borderline range with the student's performance in the conceptual domain (communication, functional pre-academics, and self-direction) falling in the extremely low range, which was considered to be an area of significant weakness; his performance in the leisure and social domain falling in the borderline range; his performance in the practical domain (community use, home living, self-care, and health and safety) falling in the below average range; and his performance in the motor domain (fine and gross motor skills) falling in the average range (id. at pp. 14-17). The evaluator noted that based on observation during testing, analysis of adaptive behavior, and interview with the parents, the results indicated the student's behavior was consistent with the upper end of the minimal-to-no symptoms range of autism spectrum disorder (id. at pp. 18-19).

Within the February 2021 educational evaluation report, the educational evaluator noted that based on the results of the parent interviews and clinical observation, it was her informed clinical opinion, using age appropriate cognitive milestones as a reference, that the student's cognitive development, receptive language skills, and adaptive behavior were at least 25 percent delayed; his overall communication, his expressive language skills, and his social/emotional development were at least 33 percent delayed; and that his gross motor and fine motor skills were adequate for his age (Parent Ex. D at pp. 21-23).

In February 2021, a behavioral observation was conducted in the student's home with his mother present (Parent Ex. D at p. 6). The educational evaluator who observed the student reported that he made open vowel sounds, explored a variety of small objects that were used for sorting, did not acknowledge or "look up" at parent request, and was observed to be self-directed (id.). According to the educational evaluator, the parent reported that the student became frustrated when his play was interrupted and would only engage in activities when he "want[ed] to" (id.). Additionally, the parent noted concerns with the student's communication, social-emotional skills, and gross motor development (id.).

Within the February 2021 speech-language evaluation report, the evaluating speech-language pathologist noted that the parents were concerned about the student's speech and socialization, as well as his progress in those areas, since he had not been around other children due to the pandemic (Parent Ex. D at p. 28). The speech-language pathologist stated that using the Preschool Language Scale-5 as a reference and the widely accepted literature, as well as parent report, informed clinical opinion, and behavioral observations, the student appeared to present with greater than 25 percent delayed receptive language skills and greater than 33 percent delayed expressive language skills (id.). In addition, the speech-language pathologist noted that the student exhibited low muscle tone characterized by an open-mouth posture at rest and tongue in the forward position, that a tongue thrust when chewing and swallowing was observed, that the student continued to use a pacifier, and that articulation, voice and fluency could not be adequately assessed due to the limited verbal language skills with the student being primarily nonverbal (id.).

The February 2021 PT evaluation report stated that the student was unable to jump forward from the last step or over objects, could not perform a single leg stance without upper extremity

support, could not throw a ball overhand or underhand, could not walk sideways, could not negotiate the stairs without hand support, could not hit a target on the wall with the ball, and still needed hand support to come up to standing (Parent Ex. D at p. 37). The PT evaluator noted that the student presented with a 33 percent delay in the acquisition of his gross motor skills (id.).

Within the February 2021 OT evaluation report, the OT evaluator noted that the parent reported the student's behavior, interactions, and functioning during the evaluation to be typical and therefore the evaluator stated that based upon the parental report, combined with clinical observations and assessment, the results of the evaluation were judged to be a valid estimate of the student's functioning (Parent Ex. D at p. 33). The February 2021 OT evaluation report stated the student had no deficits in the area of sensory integration skills and that his grasping and visual motor skills were delayed by 25 percent and his self-help skills (self-grooming, dressing, feeding with utensils, and toilet training) were delayed (id.).

**b. Parents Concern with Remote Evaluations**

Within their memorandum of law, the parents argue more specifically that the district's evaluations were inappropriate because they lacked standardized assessments and were conducted remotely.

In a question and answer guidance regarding the provision of services to students with disabilities during school closures related to the COVID-19 pandemic, the State Education Department indicated that, "districts should . . . consider ways to use distance technology" in conducting evaluations and that, "on a case-by-case basis" procedures, tests, assessments, or observations could be conducted remotely while schools were closed so long as the parents consented ("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 3-4, Office of Special Educ. Mem. [Apr. 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-1-covid-qa-memo-4-27-2020.pdf).

The parents did consent to the student's evaluations being conducted remotely (Dist. Ex. 2), but afterwards also make it known they had concerns with the remote nature of the evaluations conducted. In an undated document detailing the family stance on evaluation, the parents presented specific notes about the CPSE evaluations and stated that while they agreed that the behavior the student exhibited at the evaluation was accurately reflected in the notes on the evaluation, in some instances and for some skills the student's behavior at the time of the evaluation was atypical of his normal behavior, abilities, and performance (Parent Ex. K at pp. 1-3).

In addition, at the impartial hearing the parents identified their concerns with respect to some of the evaluations. Regarding the January 2021 psychological evaluation and the February 2021 educational evaluation, the student's father testified that he felt that they were incomplete and that there were certain aspects which could not have been handled remotely and therefore the evaluations were not a full representation of what the student could and could not do (Tr. pp. 182-84). The student's father opined that a lot of the educational evaluation "was actually just an interview" (Tr. p. 184). The student's father testified that the PT evaluation was not a formal test and that it was not a complete observation or evaluation of the student (Tr. pp. 187-88). With

respect to the February 2021 OT evaluation, the student's father stated that he felt that, while the interview portions were "pretty accurate," the actual activities for the student were "not complete enough for us" and he noted that there were activities "where he normally is very good," that he could not do that day (Tr. pp. 186-87). In sum, the parent stated his concerns that the remote nature of the evaluations did not allow for an evaluation of the student's "actual skill sets" (Tr. p. 212).

However, the parents also indicated at hearing that they understood that the evaluations included disclaimers which explained the limitations of the remote evaluation process (see Tr. pp. 184, 186-88). The State guidance described above provides that:

> In order to proceed with remote evaluations, the certified or licensed professionals who will be conducting an evaluation must determine whether they are able to perform their component of the evaluation remotely, including via telepractice, in accordance with the applicable professional practice guidance and consistent with privacy requirements. Additionally, assessment administration guides should be consulted by the certified or licensed professional to determine if administration of the assessment remotely allows for valid results. If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the method of test administration) must be included in the evaluation report. When evaluating students who are physically distant, evaluators who are licensed must use the same standards that apply to face-to-face in-person practice and adhere to the ethics standards and standards of practice as well as the laws, rules and regulations, governing their profession in New York State. Relevant guidance on telepractice is available on the NYSED Office of the Professions webpage (see NYS Professions with Telepractice Guidance). As with any evaluation, Committees must determine whether the evaluation information provides sufficient information, or whether further information is required, to determine eligibility and identify all the student's special education needs.

("Supplement #1 - Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," at pp. 3-4).

As part of the January 2021 psychological evaluation report the evaluator stated that the student's general cognitive ability was not determined due to incomplete subtests, secondary to the nature of the remote assessment (Parent Ex. D at p. 13). The January 2021 psychological evaluation report also included the disclaimer that provision of services to students with disabilities during statewide school closures due to the COVID-19 outbreak in New York State indicated that an initial evaluation could be conducted remotely, and that determination should be considered on a case-to-case basis and that in this case the parent had consented to proceed with this evaluation via "telepractice" (id. at p. 10). Additionally, the disclaimer indicated that the assessments used had been modified to accommodate the student and family during a time where face to face evaluations had been prohibited and that the evaluator had used professional judgment, observations, and information gathered from the parents, teachers, and therapists in conjunction

with assessment tasks which had varied from standard conditions (id.). The report noted that the evaluation was intended to provide the CPSE with information to determine eligibility and identify the student's special education needs (id.).

The February 2021 educational evaluation report stated that since formal test instruments had not been normed on children assessed through the use of remote "telehealth" procedures it was not appropriate for evaluators to report actual test scores under the conditions and that the evaluator's informed clinical opinion about the child's level of functioning and eligibility for services would be based on observing the child (Parent Ex. D at p. 20). In addition, the report noted that due to the student's age and the fact that the evaluation was done remotely caution should be used when interpreting the results (id. at p. 21). The report further noted that the evaluator's findings were based on the results of a parent interview, clinical observation, and the evaluator's informed clinical opinion, using age-appropriate cognitive milestones as a reference (id. at pp. 21-22).

The PT evaluator noted that the February 2021 PT evaluation report was based on clinical observation and parent interview via "telehealth" in accordance with State guidelines due to the COVID-19 pandemic and that standard practices were modified and "[f]ormal testing was not used to base eligibility" (Parent Ex. D at pp. 34, 36-37). The PT evaluator also stated, within the report, that she used her informed clinical opinion together with information gathered by observing the student, and through the parent interview, and that the Peabody Developmental Motor Scales-II (PDMS-2) and HELP strands were used as reference to evaluate the student (id.). She also noted that it was not appropriate for evaluators to report actual test scores under the given conditions (id.).

The February 2021 OT evaluation report included disclaimers similar to those detailed above and also noted that the testing was not standardized to be administered under "these circumstances" and therefore the scores were invalid and only an estimate of the student's abilities (Parent Ex. D at pp. 30-31). The OT report further stated that the results were presented in a descriptive, qualitative manner, should be interpreted with caution, and that the results of the testing provided in the report were considered an estimate of the student's actual skills and were used for comparative purposes only (id. at p. 31).

When the parents raised their concerns with the evaluations during the March 2021 CPSE meeting, they were reportedly informed that the evaluations were a "snapshot" of the student's needs and would not be "the only source" relied upon in determining the student's present levels of performance (Parent Ex. K at p. 1). In addition, the CPSE administrator testified that, during the March 2021 CPSE meeting, she inquired whether the parents wanted to pursue in-person evaluations, particularly in the area of speech-language, since the parents had "some concerns about his performance during the February 2021 speech-language evaluation and "since at that time [the district] had agencies that were able to do that" (Tr. pp. 49, 77).[23] According to the CPSE

[23] Contrary to the parents' implication, the CPSE administrator's offer of in-person evaluations or independent educational evaluations (IEEs), does not equate to an admission on the part of the district that the evaluations conducted thus far were inappropriate. The CPSE administrator appropriately responded to the parents' concerns about the speech-language evaluation in a spirit of collaboration. Further, it is not clear from the CPSE administrator's testimony that she suggested the parents seek an IEE. But in any event, a district may agree to

administrator, the parents "were not interested in . . . an in-person speech evaluation at that time" (Tr. pp. 49-50).[24] The CPSE administrator indicated that, in addition to the evaluations, the CPSE had input from the parents and the ABA provider, and that the CPSE had sufficient information to develop recommendations for the student (Tr. pp. 50-51, 81-82).

While the administration of face-to-face evaluations would no doubt have been preferrable, the evaluators used a variety of tools and strategies to gather information about the student and offered a comprehensive evaluation of the student's suspected areas of disability, and the evaluators appropriately acknowledged the limits of the evaluations under the conditions. There was nothing improper in the CPSE's use of the remote evaluations. Moreover, except as noted below, the parents do not argue that specific areas of need were not captured in the evaluations conducted in January and February 2021 (see Req. for Rev. at pp. 1-5). Accordingly, the parents' allegations about the sufficiency of the evaluations do not support a finding that the district denied the student a FAPE or impeded the parents' opportunity to participate in the CPSE process.

**c. Additional Evaluations**

Next, and insofar as the parents argue that the district failed to conduct an FBA, the educational administrator explained that the reason an FBA was not initiated was because FBAs were conducted when there were concerns with behavior and that in this case there were no concerns noted (Tr. p. 46). In addition, she stated that sometimes schools may make the request or a psychologist may determine that an FBA was needed and would make that recommendation; however, again, the educational administrator stated that in this case that recommendation was not made for the student (id.). Although the parents allege that the IHO erred in relying on the testimony of the CPSE administrator that there were no behavioral concerns, they do not point to any evidence rebutting this position or state what behaviors they observed. Accordingly, there is no reason to disturb the IHO's determination that the student did not exhibit behaviors such that an FBA would be warranted (IHO Decision at p. 13).

In their memorandum of law, the parents also allege that the initial evaluation of the student was insufficiently comprehensive because it did not include an assistive technology evaluation. The CPSE administrator stated that it was noted at the March 2021 CPSE meeting that the student was using an iPad to communicate and that he was able to communicate his needs (Tr. pp. 46-47). She testified that at the CPSE meeting she recommended that the family secure an assistive

fund an IEE obtained by the parents notwithstanding that it is confident in the sufficiency and appropriateness of its own evaluations, and a parent may obtain an IEE even if the district evaluations are found appropriate by an IHO, albeit not at district expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Not only does the district's act of informing the parents of the option to request IEEs not amount to an admission of any kind, the district is required to inform the parents of this procedural right (20 U.S.C. § 1415[d][2][A]; 34 CFR 300.504[c][1]; see 8 NYCRR 200.5[f]).

[24] The student's father testified that when the educational administrator provided the option of in-person evaluations, "we nodded our head yes and said yes, like we – we'd love to do that" (Tr. pp. 216-17). The student's father indicated that the parents understood that they needed to get additional or supplemental evaluations for the student due to the remote nature of the initial evaluations by the CPSE and so they requested IEEs near the end of April and that they were approved at the beginning of June for district funding of an independent speech-language evaluation and an independent psychological evaluation (Tr. p. 245).

technology evaluation because a formal evaluation was required in order to "make that determination" and that she provided the family with consent and "moved them along" the referral process (Tr. pp. 49, 58, 60; see Tr. p. 87). The educational administrator stated that the purpose of the assistive technology evaluation was to determine if the student needed a device in preschool and that it was not needed to finalize the student's IEP in March 2021 (Tr. pp. 81-82).

The assistive technology evaluation was completed on August 2, 2021 (Dist. Ex. 12), and the assistive technology recommendations therein were incorporated within the operative August 2021 IEP (compare Dist. Ex. 12 at p. 8, with Parent Ex. R at p. 11). The parents make no allegations regarding the sufficiency of the assistive technology evaluation or the recommendations for assistive technology included in the August 2021 IEP, focusing solely on the timing of the evaluation. As the evaluation was completed before the projected implementation date of the IEPs and incorporated within the operative IEP, the district did not commit a procedural violation by failing to conduct the assistive technology evaluation earlier.

**3. Prior Written Notice**

The parents argue that the IHO erroneously found that the district met its burden even in the absence of a prior written notice or final notice of recommendation, which was essential to any analysis of a school district provision of FAPE (Req. for Rev. ¶ 6). The IHO found that although the district failed to send a prior written notice to the parents in accordance with NYCRR 200.5(a), the parents were advised of their due process rights (IHO Decision at p. 14). In determining whether the district's procedural violation rose to the level of a denial of a FAPE, the IHO found that the parents were not denied the right to meaningful participation in the IEP decision-making process (id. at p. 15). For the reasons set forth below, the evidence in the hearing record supports the IHO's finding and does not show that there was a procedural violation that rose to the level of a denial of a FAPE in this matter.

Among the procedural requirements in State and federal regulations is the requirement that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Pursuant to State and federal regulation, a prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

The hearing record shows that the parents participated in both the March and August 2021 CPSE meetings, which developed the student's program for the 2021-22 school year (Parent Ex. R at p. 16; Dist. Ex. 13 at p. 2).

Additionally, although the district did not issue a prior written notice for the 2021-22 school year, there is no indication in the hearing record that the parent was not aware of the recommendations made for the student's programming. The parents testified that they received a

copy of the March 2021 IEP on April 14, 2021, and they met with the CPSE administrator on April 16, 2021, to go over the goals as they appeared in the IEP (Tr. pp. 224-228, 238-241). The parents likewise were aware of the recommendations of the August 2021 CPSEs (see Tr. pp. 251-54).

Consequently, there is no indication in the hearing record in this case that any lack of a timely prior written notice was a procedural violation that rose to the level of a denial of FAPE as any such violation did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

**D. School Location**

The parents' allegations about the absence of an FNR will be separately addressed.

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320).

The IHO relied on the availability of ADAPT to conclude that a school location was available for the student to attend for the 2021-22 school year (see IHO Decision at p. 19); however, ADAPT was available to implement the recommendations of the March 2021 IEP and that IEP was replaced by the August 2021 IEP, as discussed above (see Dist. Ex. 14).

With respect to the location for implementation of the August 2021 IEP, the recommended services were to be delivered at an early childhood center selected by the parents (Parent Ex. R at pp. 10-11), in contrast to the March 2021 IEP which recommended a State-approved special education program (Parent Ex. F at p. 24). State regulation defines an "early childhood program" as "a regular preschool program or day care program approved or licensed by a governmental agency in which a child under the age of five attends" (8 NYCRR 200.16[i][3][ii]). Similarly, the student's father described his understanding of the recommendation as a SEIT "within a general ed[ucation] classroom" (Tr. p. 253). In other words, the student should have been able to receive the SEIT and related services in the preschool program he would have attended if he did not have a disability.

The identification of a regular education preschool program for a student is a process that is applicable to all students, not just students with disabilities. The policies and procedures that the district uses to match preschool students (both disabled and nondisabled) with preschool sites and service providers was not made part of the evidentiary record relied upon by the IHO. For example, State regulations explain that certain preschool programs must have random selection processes when the number of students who apply exceed the number of seats available (see 8 NYCRR 151-1.4). The State has recently initiated significant changes to foster a greater number of public and/or publicly funded preschool and early learning opportunities (see, e.g., Matter of DeVera, 32 N.Y.3d 423, 427-31 [2018] [detailing the history of the "legacy" universal prekindergarten statute (Education Law § 3602-e), the changes effectuated by the "statewide"

universal prekindergarten legislation codified in Education Law § 3602-ee, and the intervening addition of the Charter School Act]). It was recently reported to the New York State Board of Regents that there were seven separate early learning programs for three- and or four-year-olds with unique funding streams and requirements attendant to each program (see New York State Education Department; Proposal to Align Prekindergarten Programs in New York State [Jan. 2017], available at https://www.regents.nysed.gov/common/regents/files/Proposal%20to%20Align%20Prekindergarten%20Programs%20in%20New%20York%20State.pdf ), and many providers, both public and nonpublic, administer multiple programs alongside one another simultaneously, adding to the administrative complexity of placing students (see New York State Prekindergarten Program Directory, available at http://www.nysed.gov/early-learning/state-administered-prekindergarten-programs-directory-programs).

Although the parents focus to a great degree on the lack of a timely FNR, an FNR is a form specific to the district and is not required by federal or State law or regulation.[25] The parents do not challenge the recommendation on the IEP that the location be a childhood location selected by them (Parent Ex. R at pp. 10-11). The parents do not allege with any particularity that they did not what the selection process was for a regular education preschool program or for that matter that they did not know where to send their child to school for the 2021-22 school year. Under the circumstances, the parents' allegations do not support a finding that the district denied the student a FAPE or materially deviated from the requirements of the IEP.

**VII. Conclusion**

Having determined the evidence in the hearing record establishes that the district offered the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the Rebecca School was an appropriate unilateral placement for the student (Burlington, 471U.S. 370). Likewise, there is no need to reach the issue of whether equitable considerations support an award of tuition reimbursement (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find they need not be addressed in light of my determinations above.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**July 1, 2022**

**SARAH L. HARRINGTON**
**STATE REVIEW OFFICER**

[25] For example, within the due process complaint notice, the parents allege only that: "The Student's projected IEP implementation date is September 5, 2021, yet, to date, the Department has not issued a Final Notice of Recommendation nor prior written notice of its final placement recommendation for the Student" (Parent Ex. B at p. 7).