



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-173

Application of the BOARD OF EDUCATION OF THE GARDEN CITY UNION FREE SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Guercio & Guercio, LLP, attorneys for petitioner, by Rachel N. Roth, Esq.

Gina DeCrescenzo, PC, attorneys for respondents, by Benjamin Brown, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for the costs associated with the home instructional program for the 2020-21 and 2021-22 school years. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this appeal has received a diagnosis of Down Syndrome and was found eligible for special education services as a student with multiple disabilities (Dist. Exs. 15 at p. 1; 19 at p. 1).¹ The student attended a private preschool and for kindergarten and continuing through to 2016, the student attended a special class within the district (Parent Exs. B at p. 3; C at p. 2). In

¹ The student's eligibility for special education as a student with multiple disabilities is not in dispute in this proceeding (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

2016 and continuing through the 2019-20 school year, the student attended Fit Learning which was an individualized instructional program (Dist. Ex. 20 at p. 2).²

In March and April 2016, the student underwent a psychoeducational evaluation at the request of her parents "to assess her current level of cognitive and academic functioning and to assist in appropriate educational planning" (Parent Ex. B at p. 1). The evaluating neuropsychologist reported that the student attained "extremely low score across cognitive and academic testing" with "delayed speech and language acquisition" (*id.* at p. 8). An updated psychological reevaluation, completed in July 2018 by the same neuropsychologist, found that the student's cognitive functioning, nonverbal abilities, working memory, and processing efficiency remained consistent with her performance in 2016 (Parent Ex. C at pp. 6-7). In April 2020, the same neuropsychologist conducted another psychological reevaluation and found that the student's "verbal and nonverbal cognitive abilities [were] in the extremely low range, consistent with performance during her previous evaluation" (Dist. Ex. 20 at p. 5).³

On May 26, 2020, the CSE convened for purposes of a reevaluation/annual review of the student's educational program and continued to find her eligible for special education as a student with multiple disabilities (see generally Dist. Ex. 1). According to the resultant IEP, the student presented with "significant delays" and required a "small teacher-to-student ratio program" with "positive behavioral supports throughout the day" (*id.* at p. 8). For the 10-month portion of the 2020-21 school year, the May 2020 CSE recommended the following program: a 1:1 special class three times per day for 42 minutes; an 8:1+2 special class every other day for 42 minutes; an 8:1+2 extended school day special class two days a week for 90 minutes; and an 8:1+2 adapted physical education class every other day for 42 minutes (*id.* at p. 15). Additionally, the May 2020 CSE recommended related services of one 42-minute session per week of individual occupational therapy (OT), four 42-minute sessions per week of individual speech-language therapy, and two 42-minute sessions per day of individual vocational counseling (*id.*). The May 2020 CSE recommended supplementary aids and services, which included extended response time; verbal/nonverbal cues; repetition and modeling; visual aids; a 1:1 aide for transitions, lunch, electives, adapted physical education, and extracurricular activities; refocusing and redirection; breaks as needed; reteaching of materials; positive verbal praise; and scaffolding of directions (*id.* at pp. 15-16). Further, the May 2020 CSE recommended an assistive technology consultation 10 hours per year and behavioral consultant 40 hours per year to support school personnel on behalf of the student (*id.* at p. 16). Lastly, the May 2020 CSE recommended alternate assessments, 12-month services consisting of a 1:1 special class and individual speech-language therapy, and special transportation (*id.* at pp. 16-19).

Next, the CSE reconvened on September 15, 2020 for a requested review (see generally Dist. Ex. 2). The September 2020 CSE maintained the recommendations from the May 2020 IEP

² There was testimony that the student attended Fit Learning as a result of an agreement between the parties (see Tr. pp. 34-35, 226, 1694).

³ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only district exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

but also recommended an additional 42-minute period per day of 8:1+2 special class instruction (compare Dist. Ex. 1 at pp. 15-19 with Dist. Ex. 2 at pp. 15-19).

On December 4, 2020, the CSE again reconvened for a requested review (see generally Dist. Ex. 3). The December 2020 CSE recommended that the student attend an 8:1+2 special class every other day for 42 minutes; an 8:1+2 special class two times per day for 42 minutes; an 8:1+2 special class five times a day for 1:1 instruction by the special education teacher or teacher assistant in reading, writing, math, and vocational skills; and an 8:1+2 adapted physical education class every other day (Dist. Ex. 3 at p. 17). The recommended related services and supplementary aids and services remained the same as in the student's May 2020 IEP (compare Dist. Ex. 1 at pp. 15-16 with Dist. Ex. 3 at pp. 17-18). Additionally, the December 2020 CSE added team meetings with the parents once per month (Dist. Ex. 3 at p. 18). Further, the student continued to be recommended for alternate assessments, 12-month services, and special transportation (id. at pp. 18-20).

The student attended the district's recommended program from September 29, 2020 and continuing through January 22, 2021 (Dist. Exs. 29 at p. 1; 30 at pp. 2-5). Beginning on January 25, 2021, the student started a home instructional program that consisted of 1:1 applied behavior analysis (ABA) instruction (Dist. Ex. 29 at p. 1).

The CSE met for the student's annual review on June 8, 2021 (see generally Dist. Ex. 4). At the time of the meeting the student was receiving ABA instruction, speech-language/PROMPT therapy, and physical therapy (PT) at home (Dist. Ex. 4 at p. 1).⁴ For the 2021-22 school year, the June 2021 CSE recommended that the student attend an 8:1+2 special class for functional academics every other day for 42 minutes; an 8:1+2 special class six times per day for 42 minutes; and an 8:1+2 special class for adapted physical education every other day for 42 minutes (id. at p. 18). The June 8, 2021 CSE determined that the student's "individualized instruction" would be provided in the classroom and not in a separate location (id. at p. 2). In addition to OT and speech-language therapy, the June 8, 2021 CSE recommended the student receive one 42-minute session per week of PT (id. at p. 18). The CSE continued to recommend the student be provided with the support of a 1:1 aide for transitions and extracurricular activities and that she be provided with a shared aide (5:1) for lunch, electives, and adapted physical education (id. at p. 19). The IEP no longer reflected a CSE recommendation for an assistive technology consultation, but the remainder of the supplementary aids and services continued to be recommended along with alternate assessments, 12-month services, and special transportation (id. at pp. 18-22).

On June 21, 2021, the parents notified the district of their disagreement with the district's recommendations for the 2021-22 school year and their intention to implement a home instruction program for the student for the 2021-22 school year and seek reimbursement of the costs of the program from the district (Parent Ex. I at pp. 1-2).

⁴ "PROMPT" is typically used as an acronym for "prompts for restructuring oral muscular phonetic targets"—a method of instruction used by speech-language pathologists (see, e.g., Application of a Student with a Disability, Appeal No. 20-002).

In response to the parents' June 2021 letter, the district reconvened a CSE meeting on June 30, 2021 to discuss the parents' concerns with respect to the recommendations made at the June 8, 2021 CSE meeting (see generally Dist. Ex. 45). The parents expressed their concerns, but the June 30, 2021 CSE did not recommend any changes to the program and services recommended at the June 8, 2021 CSE meeting (compare Dist. Ex. 4 at pp. 18-22, with Dist. Ex. 45 at pp. 1-2, 15-19). The student attended the home instructional program for the 2021-22 school year (see generally Parent Exs. DD, FF, HH).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 30, 2021, the parents alleged that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (see Parent Ex. A).

Specifically, the parents alleged that the district failed to implement the May and December 2020 IEPs (Parent Ex. A at p. 12). The parents asserted that, although the May 2020 IEP recommended OT once a week, only some sessions were provided to the student and "most sessions were skipped by the [d]istrict" (id. at p. 8). Additionally, the parents claimed that the 1:1 instruction recommended on the May 2020 IEP was not provided by a certified teacher (id.). Further, the parents claimed that the "Digitability" program used by the district was inappropriate for the student (id.).

The parents argued that the 8:1+2 special class recommended by the December 2020 CSE was "not capable of implementing the 1:1 instruction" mandated on the student's IEP (Parent Ex. A at pp. 10, 12). Without reference to a specific IEP, the parents argued that the IEP's annual goals were not measurable as they "were not based on reliable baseline data" with respect to the student's abilities and did not "correctly target" skills she needed to develop (id. at p. 12). The parents also alleged that the IEPs failed to contain appropriate progress monitoring (id. at p. 13).

Further, the parents argued that the district failed to perform a functional vocational evaluation and other vocational or transition-related assessments (Parent Ex. A at p. 13). The parents asserted that the CSEs failed to consider the student's preferences and interests with respect to transition planning and failed to invite the student to the May and December 2020 CSE meetings or the June 8, 2021 CSE meeting to consider her postsecondary goals (id. at pp. 13-14). Although the student was invited to and attended the June 30, 2021 CSE meeting, the parents argued that the CSE "made no effort to speak with her about her postsecondary aspirations and her career-related needs, preferences, and interests" (id. at p. 14). The parents alleged that the IEPs failed to provide an "adequate" transition plan, goals, and services (id. at p. 15). They argued that the student's behavior impeded her education as she engaged "in oppositional behavior, work refusal, and distractible and self-directed behavior during instructional time" and therefore, the district should have conducted a functional behavioral assessment (FBA) (id. at pp. 15-16).

The parents argued that the district failed to offer methodologies or strategies that were peer reviewed to meet the student's educational needs (Parent Ex. A at p. 16). The parents asserted that the CSEs should have considered recommending ABA and PROMPT methodologies on the student's IEPs as there was "clear consensus" that the student required ABA and PROMPT and the failure to do so denied the student a FAPE (id. at pp. 16-17).

The parents argued that the student made academic and functional progress in the home instructional program using 1:1 ABA with PROMPT speech-language therapy (Parent Ex. A at p. 18). They argued that the home instructional program included extracurricular activities which offered the student the opportunity for socialization (id.). In connection with their request for reimbursement of the costs of the home instructional program, the parents contended that they cooperated with the district, shared information, participated in the CSE meetings, and provided notice of their intent to home school the student such that equitable considerations favored the parents (id. at pp. 18-19).

Based upon the foregoing, the parents requested a finding that the student was denied a FAPE for the 2020-21 and 2021-22 school years and that the procedural and substantive violations committed by the district impeded the parents' ability to participate in the CSE process which caused the student a "deprivation of educational benefits" (Parent Ex. A at p. 19). As relief, the parents sought a functional vocational evaluation, that the student be invited to the next CSE meeting to consider her postsecondary preferences and interests, monetary damages for alleged disability harassment, reimbursement for all services provided by the parents from July 1, 2020 through June 30, 2022, and compensatory educational services for the period of time that the student participated in the district's program for the 2020-21 school year (id.).

On August 13, 2021, the district submitted a response to the due process complaint notice which generally denied the material allegations contained in the due process complaint notice. The district argued that it offered the student a FAPE for the 2020-21 and 2021-22 school years. In addition, the district argued that any procedural inadequacies alleged by the parents did not impede the student's right to a FAPE; did not impede the parents' opportunity to participate; or deprive the student of educational benefits. Lastly, the district argued that the equities weighed in favor of the district and did not support any award requested by the parents.

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 17, 2021 and concluded on July 20, 2022 after 14 days of proceedings (Tr. pp. 1-2036). In a decision dated November 14, 2022, the IHO found that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years and awarded the parents reimbursement for the home instructional program (IHO Decision at p. 23).

At the outset of his decision, the IHO found that the parents' right to participate "was severely impacted" by "procedural and substantive inadequacies" committed by the district (IHO Decision at p. 10).

Next, the IHO compared the September 2020 IEP with the December 2020 IEP finding that the 1:1 special class was removed from the December 2020 IEP (IHO Decision at p. 11). The IHO found that the student's schedule changed on November 30, 2020 by removing the 1:1 special class and instead providing the 1:1 instruction within the 8:1+2 special class even though the change was not made on the IEP until December 4, 2020 and was not supposed to be implemented until January 4, 2021 (id.). The IHO held that the reason for removing the 1:1 special class should have been discussed in a CSE meeting before any changes were implemented and implementing a

program without first holding a meeting denied the parents' participation in the CSE process and denied a FAPE to the student (id. at p. 12).

Next, the IHO discussed speech-language therapy, and found that the district provided speech-language therapy in the classroom as a push-in service and not in a therapy room as mandated on the IEP (IHO Decision at p. 12). The IHO also found that the speech-language therapy was "sometimes" provided in a group instead of on an individual basis (id. at p. 13). In connection with vocational instruction, the IHO found that the district's director of pupil personnel services was unable to describe how the vocational instruction was provided to the student and that the classroom teacher testified that the student received some of the vocational instruction in a group and not individually (id.). Further, the IHO discussed the district's use of a program called "Digitability" which failed to align with the student's vocational goals (id.). The IHO found that these combined deviations from the IEP were substantial as the student required individual instruction as set forth on her IEP (id.).

Then, the IHO addressed predetermination with respect to instructional methodology (see IHO Decision at pp. 13-15). The IHO found that the district had a policy that "precluded a necessary discussion on whether or not a specific methodology is required" (id. at p. 14). The IHO found that the district cannot take away the CSE's ability to have discussions based on "rigid and inflexible policies" (id.). Consequently, the IHO held that the CSE's failure to discuss whether a certain methodology was required for the student constituted predetermination (id. at p. 15).

The IHO then turned to a discussion about the student's present levels of performance as described in the IEPs (see IHO Decision at pp. 15-16). The IHO found that evaluative information described the student's reading skills at the kindergarten level or lower (id. at p. 15). Next, the IHO described that the evidence in the hearing record demonstrated that the student "was expected to achieve skills such as writing an email independently and learning technical concepts such as a uniform resource locator (URL) and widget assembly" (id. at p. 16). The IHO concluded that the "formation of emails and advanced technical concepts are not appropriate goals for a [s]tudent reading at a kindergarten level" (id.).

In connection with transition planning, the IHO found that the four IEPs were vague and failed to "set clear direction" with respect to transition planning (IHO Decision at p. 16).⁵ Specifically, the IHO found that the September 2020 IEP failed to set forth a transition plan for the student to "transition and integrate into society beyond high school years" (id. at pp. 16-17). The IHO relied on the testimony of the district's assistant principal for guidance and pupil personnel services (assistant principal) that the student's transition goal "could apply to any student" and therefore, was vague and "without substantive meaning" resulting in a denial of FAPE (id. at p. 17).

Next, the IHO discussed the appropriateness of the home instructional program (see IHO Decision at pp. 17-18). The IHO found that the evidence in the hearing record established that the student acquired skills and the student made progress in PT and speech-language therapy (id. at p.

⁵ There were five IEPs at issue in this case – May 26, 2020; September 15, 2020; December 4, 2020; June 8, 2021; June 30, 2021 – however, the IHO did not reference which four IEP's he was discussing.

18). The IHO found that the home instructional program "was tailored to the [s]tudent's needs and provided the student with actual progress" (*id.*). Then, the IHO considered the least restrictive environment (LRE) with respect to the home instructional program and found that individual home instruction "is among the most restrictive environments for a [s]tudent and this type of intervention simply does not afford the student with socialization opportunities as well as opportunities to practice these skills in a group setting" (*id.* at pp. 18-19). The IHO found that the evidence in the hearing record demonstrated that the student enjoyed socializing with her peers, but the parents provided the student with "extracurricular activities and structured programs" for socialization (*id.* at p. 19). The IHO held that these socialization opportunities provided by the parents may not be "optimal," but it was sufficient to meet the LRE requirements (*id.*).

The IHO next addressed equitable considerations (*see* IHO Decision at pp. 19-23). The IHO discussed that parental involvement should be encouraged and the district should "act reasonably" to respond to the parents' concerns (*id.* at p. 21). The IHO identified one equitable issue which was the "speed by which the [parents] expectations were not met and the student's removal from the [d]istrict" (*id.* at p. 22). The IHO found it was difficult to "gauge" a program by weeks/months or identify progress in that brief period of time (*id.*). The IHO further proceeded to discuss that this was the purpose of annual reviews because it allows time for the student "to become acclimated to the program and strengths and deficits in the program can be more clearly identified and remedied" (*id.*). The IHO concluded that the district was not required to maximize the student's potential which was something "that may have been lost at the CSE meetings" (*id.*). The IHO found that the parents "rush" to find the district "in default" was considered in his equities determination but did not warrant a reduction or dismissal of the parents' right to relief (*id.* at pp. 22-23).

Ultimately, the IHO ordered the district to reimburse the parents or directly fund the provider for services in connection with the ABA home instructional program and ordered the district to conduct a functional vocational evaluation of the student (IHO Decision at p. 23).

IV. Appeal for State-Level Review

The district appeals arguing that the IHO erred in finding that the district denied the student a FAPE for the 2020-21 and 2021-22 school years and awarding the parents reimbursement for the cost of the home instructional program and ordering it to conduct a functional vocational evaluation.

The district first asserts on appeal that the IHO erred in finding that the parents' right to participate was "severely impacted by procedural and substantive inadequacies." The district argues that the evidence in the hearing record fails to support this finding and is "based on incomplete or misrepresented testimony or evidence."

Next, the district contends that the IHO erroneously found that it predetermined the December 2020 recommendations prior to the meeting. The district asserts that the change with respect to 1:1 academic and vocational instruction was made on the December 2020 IEP "after extensive discussion at the December CSE meeting with respect to how [the student] was functioning in her program and whether the [CSE] felt that providing 1:1 instruction within the

classroom was appropriate at that time." The district claims that the recommendation by the December 2020 CSE was based upon data presented to the CSE during the meeting.

The district argues that the IHO's conclusion that the student's speech-language therapy and vocational services were not provided in accordance with the mandates of the IEP was in error. The district contends that the IHO's conclusions were based upon the testimony of the student's 1:1 aide who could not specifically identify how the speech-language therapy was provided to the student. The district argues that the speech-language pathologist testified that the student did not work with the student in a group and did not provide push-in services. In connection with vocational services, the district argues that the IHO failed to reference evidence in the hearing record to support his conclusion.

The district further appeals from the IHO's finding that it denied the student a FAPE by failing to recommend PROMPT therapy or ABA therapy on the student's IEP. The district points out that the CSE is not required to include methodology on an IEP as this is left to the discretion of the teacher or related service providers. Further, the district asserts that both PROMPT and ABA were discussed at CSE meetings, and both were "incorporated into the [s]tudent's program." The district argues that there was no indication that these two methodologies were required for the student to make progress.

The district argues that the IHO erred in finding that the student learning concepts such as using the internet and email were not appropriate. The district asserts that the annual goals aligned with the student's present levels of performance. Further, the district argues that if the one goal out of 36 was found to be inappropriate, such a deficiency was "de minimis" and did not deprive the student of an educational benefit (id.).

Next, the district argues that the IHO erred in determining that the transition planning recommended by the CSEs denied the student a FAPE. The district contends that the transition plan developed for the student "was tailored" to her specific interests and as the student continued her education in the district her postsecondary goals and activities would change with her interests.

The district then argues that the IHO erred in finding that the home instructional program was appropriate. The district contends that the home instructional program lacked vocational activities, socialization, and was "extremely restrictive" for the student. In addition, the district contends that the IHO erred in finding that the equitable considerations favored the parents' request for relief. The district further argues that the basis for the IHO's conclusion was that the district failed to "engage the [p]arents sufficiently" but that the IHO ignored the evidence in the hearing record with respect to the district's engagement of the parents through correspondence, and meetings addressing the parents' concerns.

The district argues that the IHO failed to address any deficits specific to 2021-22 school year but still awarded the parents reimbursement for the home instructional program for that school year. Based upon the foregoing, the district requests that the IHO's decision be reversed in its entirety.

In an answer, the parents generally deny the material allegations contained in the request for review. Initially, the parents raise compliance issues with the State practice regulations with respect to the district's first and tenth claims in its request for review.

The parents argue that contrary to the district's contentions the hearing record evidenced "numerous procedural violations that in fact interfered with parental participation" and the district engaged in predetermination. In connection with the district's contention that it properly implemented the 1:1 instruction, the parents argue that the district "prematurely" removed the student from the 1:1 special class and placed her in an 8:1+2 special class with 1:1 in the classroom prior to the December 2020 CSE meeting. Next, the parents argue that the evidence in the hearing record established that the speech-language therapy and vocational services were not implemented in accordance with the IEP.

With respect to the issue of predetermination and methodology, the parents argue that the district misstated the IHO's finding regarding ABA and PROMPT. The parents contend that the IHO did not find that the student required either ABA or PROMPT but instead found that the district refused to consider the student's need for a specific methodology at the CSE meetings. The parents argue that the CSE "was required to hold a genuine" discussion about the student's need for specific methodologies. Next, the parents argue that the IHO properly held that the district's vocational instruction, i.e., writing emails, for the student was not in line with the student's level of functioning. In addition, the parents assert that the IHO was correct in finding that the district's transition plan for the student was vague.

With respect to the appropriateness of the home instructional program, the parents seek to uphold the IHO's finding that it was appropriate as the student "required a large amount of highly structured 1:1 instruction to make and retain progress with fundamental language and daily living skills." As for equitable considerations, the parents argue that the district's predetermination and denial of parental participation as found by the IHO supported an award of relief to the parents.

The parents allege that the district's claim that the IHO failed to find inadequacies with the 2021-22 school year was without merit as "numerous" IHO findings pertained to "procedural violations and insufficient services" for the 2021-22 school year. As relief, the parents seek a dismissal of the district's request for review.

The district replied to the parents' answer generally denying all of the allegations contained therein and reaffirmed its position that the IHO decision should be vacated.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

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

VI. Discussion

A. Preliminary Matter – Compliance with Practice Regulations

The parents contend that the district's first and tenth claims of the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][2]-[3]).

State regulations provide 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

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

In relevant part, Section 279.8 of the State regulations requires that a request for review shall set forth:

(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][2]-[3]).

Generally, 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]; *see Davis v. Carranza*, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; *M.C. v. Mamaroneck Union Free Sch. Dist.*, 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; *T.W. v. Spencerport Cent. Sch. Dist.*, 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (*J.E. v. Chappaqua Cent. Sch. Dist.*, 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting *Foman v. Davis*, 371 U.S. 178 [1962]).

In this case, a review of the district's request for review does not support the parents' contentions. I find that, contrary to the parents' arguments, the request for review adequately identifies the specific findings of the IHO which the district appeals and explains the grounds for review or modification of those findings (*see* Req. for Rev. ¶¶ 5-7, 32-33). While the district does not elaborate in great detail the reasons for overturning the IHO's findings in the request for review, the district's memorandum of law sufficiently and properly includes arguments in support of overturning the IHO's findings presented for appeal in the request for review, with appropriate citations to the evidence in the hearing record (*see generally* District Mem. of Law). Additionally, the parents do not assert any prejudice in their ability to either prepare an answer responding to the district's allegations or in their ability to do so in a timely manner. To the contrary, the parents formulated an answer responsive to the specific issues raised in the district's request for review. Consequently, there is no basis upon which to dismiss the district's first and tenth claims in the request for review for the failure to comply with practice regulations.

B. 2020-21 School Year

In this case, the CSE developed three separate IEPs for the 2020-21 school year at meetings held on May 26, 2020, September 15, 2020, and December 4, 2020 (see Dist. Exs. 1-3). In connection with the 2020-21 school year, the IHO examined all three of these IEPs (see IHO Decision at pp. 6-8, 11-12, 16). For purposes of this discussion, the student's needs as reviewed by each CSE, which are not materially in dispute, will be set forth in order to contextualize the parents' claims within the CSE process and IEP development that occurred before turning to the specific issues on appeal.

1. CSE Meetings and Student's Needs

a. May 26, 2020 IEP

A CSE convened on May 26, 2020, via web-based audio conferencing for the student's annual review (Dist. Ex. 1 at p. 1). At the time of this CSE meeting the student attended Fit Learning where, according to the district director of pupil personnel services (director), the student received 1:1 instruction (Tr. pp. 227-28; Dist. Ex. 1 at p. 1).⁷ The May 2020 CSE meeting information summary indicated that, in addition to the CSE chairperson, the committee consisted of the director, the assistant principal, a school psychologist, a regular education teacher, a special education teacher, a speech-language pathologist, a case manager from Fit Learning, and the student's parents (Dist. Ex. 1 at p. 1). According to the June 16, 2020 prior written notice and testimony from participants at the CSE meeting, the May 2020 CSE considered an April 27, 2020 private psychological reevaluation from an independent evaluator, an April 15, 2020 quarterly progress report from Fit Learning, an April 8, 2020 transition assessment (parent/guardian questionnaire), a March 6, 2020 district psychological evaluation conducted by the district at Fit Learning, a February 22, 2020 educational evaluation completed by a district special education teacher during a visit to Fit Learning, a February 13, 2020 speech-language evaluation conducted by a district speech-language pathologist at Fit Learning, a May 23, 2018 IEP, and the discussion at the May 2020 CSE meeting (Tr. pp. 343-44, 349-51, 353, 481-83, 1116; Dist. Exs. 1 at p. 3; 5 at pp. 1-2; 17 at p. 1; 22 at p. 1; 23 at p. 1). The May 2020 CSE chairperson testified that she observed the student at Fit Learning, spoke with the student, observed the student working, spoke with her teachers, and spoke with the staff who conducted the district evaluations (Tr. pp. 330, 343-45). She indicated that her observation at Fit Learning provided her with a "snapshot" of the student but that it was information from the quarterly progress report and conversations at the CSE meeting that were more helpful (Tr. pp. 347-48). The CSE chairperson testified that Fit Learning provided "a lot of different benchmarks, so based on the programs that Fit Learning was using" with the student the district had information going into the CSE meeting that allowed for meaningful discussion during the meeting (Tr. p. 348).⁸

⁷ For the 2016-17, 2017-18, 2018-19, and 2019-20 school years, the student attended Fit Learning wherein she received 1:1 ABA academic instruction and two 45-minute sessions per week of speech-language therapy (Tr. pp. 227-28, 1694; Parent Exs. A at p. 2; C at pp. 1-2). The district's director testified that "Fit Learning was considered a home school option" and "a tutoring program" (Tr. pp. 34-35).

⁸ The May 2020 CSE chairperson testified that the CSE looked at and reviewed extensive data from Fit Learning

The May 2020 IEP included the student's present levels of performance in academics, cognition, daily living skills, career/vocation/transition skills, social development, and physical abilities (Dist. Ex. 1 at pp. 5-7). With respect to the student's academic achievement, the May 2020 IEP indicated that the student's performance on a February 14, 2020 district administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) indicated that the student was able to identify the names and sounds of letters, demonstrated strong phonemic awareness when presented with words in isolation, and was able to identify digraphs and blends (id. at p. 5). It was noted that she decoded simple consonant-vowel-consonant (CVC) words but when presented with words in text, the student read with limited fluency and had difficulty locating information in text to answer literal comprehension questions (id.). The IEP also reported from Fit Learning that the student's reading was assessed using norm-referenced curriculum-based measures which indicated that the student's scores had decreased on measures related to identifying letter names, identifying letter sounds, and reading nonsense words (id.). The IEP noted an increase in the student's scores related to phoneme segmentation but a decrease in her oral reading speed scores as compared to the last assessment (id.). The IEP also indicated that, according to Fit Learning, the student mastered short and long vowels, bossy r, and regular vowel pairs but noted that she required continuous review and repetition of skills to promote retention (id.). Further, the Fit Learning information indicated that the student had difficulty with blends and digraphs, but she could "do it" when she put forth effort (id.). The student was also reported to be working on relational skills such as when, where, why, and how (id.). According to the IEP, a spelling subtest of the WAIT-III was attempted by the district but the student's non-compliant behavior impacted the assessment, and an adequate assessment of her writing skills was not obtained, however, according to her then current placement (Fit Learning) the student could spell 14-20 CVC words (id.).

The May 2020 IEP also reflected the student's abilities in mathematics and stated that, on the WAIT-III, the student demonstrated the ability to identify numbers, count with one-to-one correspondence, identify shapes, understand simple pictographs, and she knew concepts such as longest, more, less, and all (Dist. Ex. 1 at p. 5). The May 2020 IEP indicated that the student could perform simple single-digit addition and subtraction problems that she appeared to know by rote but that she struggled with novel mathematical problems that required the use of a strategy such as counting on her fingers or using tallies (id. at pp. 5-6). The May 2020 IEP reflected information from Fit Learning, which indicated that the student's math skills were also assessed using norm-referenced curriculum-based measures (id. at p. 6). These measures showed that the student's score improved on counting improved, while he scores related to identifying numbers, quantity discrimination, and identifying missing numbers in a sequence all decreased (id.). According to the IEP, at Fit Learning the student was working on core fluency for mathematics, she had exposure to place value, and she could solve single digit addition and subtraction problems using a tally method (id.). The student was also working on fluency with fact families, nearing identification of two-digit numbers, and could count by 10s and down from 100 (id.).

The May 2020 IEP indicated that the student's speech-language development was characterized by global speech, language, and articulation delays (Dist. Ex. 1 at p. 5). She communicated with one word but when prompted she was able to increase her utterance length to

(Tr. p. 532).

three words (id.). The student's speech intelligibility in a known context was considered fair but when the context was unknown her intelligibility decreased (id.). The IEP stated that on formal assessment using the Comprehensive Receptive and Expressive Vocabulary Test-Third Edition, the student's expressive and receptive vocabularies were an area of delay although she was able to identify animals, some modes of transportation, and the occupations of doctor and fireman (id.). According to the IEP, item analysis revealed that the student presented with difficulty identifying stimulus words based on category, and by part/whole relationship (id.). The student's overall tone was reported to be hypotonic and upon observation of her speech musculature the student presented with a lack of tongue/jaw dissociation, independent lip/tongue control, a jaw slide, inadequate voice/voiceless contrast control, and over round and retracted lips during the production of vowel /i/ and /o/ (id.).

With respect to cognition and daily living skills the May 2020 IEP included findings from the private April 2020 psychological reevaluation report which indicated that the student's verbal and nonverbal cognitive abilities were in the extremely low range, consistent with her performance in previous evaluations (Dist. Ex. 1 at p. 6; see Dist. Ex. 20). According to the IEP, the April 2020 psychological reevaluation indicated that the student's reading skills were at a mid-kindergarten level and that the student exhibited ongoing challenges with attention, self-regulation, and functional communication which "despite her clear and strong social interest, limit the depth of her interpersonal relationships" (Dist. Ex. 1 at p. 6). Regarding the student's behavior, the May 2020 IEP indicated that at Fit Learning the student made significant progress in terms of behaviors, specifically noting that she improved from two hours (in 2016) to less than 10 minutes of noncompliant episodes per session (id. at p. 8). The IEP reflected the student's performance on the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), administered in March 2020, that yielded a full-scale IQ of 45, characterized as representing "extremely low general cognitive ability" (id. at p. 6). with the IEP noted that the student's general verbal and nonverbal abilities were similarly in the extremely low range, although her verbal abilities were significantly better developed compared to her nonverbal abilities (id. at p. 6). The IEP further reflected that, according to the March 2020 administration of the WISC-V, the student's ability to sustain attention, concentrated and exert mental control was in the extremely low range as were her inductive and deductive reasoning skills, conceptual thinking, and abstract reasoning ability (id.; see Dist. Ex. 20). According to the IEP, the student's extremely low score on a processing speed task indicated significant difficulties with graphomotor and visual scanning abilities (Dist. Ex. 1 at p. 6).

The May 2020 IEP indicated that the "Assessment of Adaptive Behavior Skills within the school setting" demonstrated that the student's overall adaptive skills were in the extremely low range relative to her same aged peers and noted that her adaptive functioning appeared to be commensurate with her then-current level of intellectual functioning and, although below same aged peers, the student's adaptive skills in the social domain were a relative strength as compared to her skills in the conceptual and practical domains (Dist. Ex. 1 at p. 6). With respect to career/vocational/transition skills, the May 2020 IEP noted that according to Fit Learning, the student was working on laundry skills, she walked to the local supermarket to buy lunch, she was working on cell phone skills, and emailing with supervision (id.).

Regarding the student's social development, the May 2020 IEP reported information obtained from Fit Learning which indicated that the student enjoyed playing tag with another

student, she was "very" social and initiated conversations with peers and adults at the center, and she participated in lunch with peers, as well as a workout/dance activity daily (Dist. Ex. 1 at p. 7). According to Fit Learning, the student enjoyed participating in a virtual group daily mindfulness/yoga activity and she and another student helped coordinate a talent show in which she performed a gymnastics routine (id.). Fit Learning also reported that the student required a high level of reinforcement to remain on task and to promote positive social behaviors, noting that she had become accustomed to a system which included "barriers," (behaviors that get in the way, such as putting her head down, turning off the computer, using one word, sloppy sitting, and closing her eyes) and breakthroughs (behaviors that help, such as listening, talking fast, using sentences, asking for help, and saying, "Ok" or "Yes") (id.). The May 2020 IEP reported that at Fit Learning the student also had access to pictures of preferred topics (such as dogs, weddings, and college) to increase motivation (id.). The May 2020 IEP noted that the student needed to replace noncompliant behaviors with functional communication to express how she felt when frustrated, sad, disappointed, or fatigued and to use feeling words or colors associated with feelings to help identify how she and others were feeling (id.). The IEP also noted that the student needed to help connect her negative feelings with what was happening to help express herself (id.). It was reported that this functional communication helped her with what she would like in the moment (a break, knowledge of how much longer, when she could have access to what she wanted, or validation of her feelings and encouragement) (id.). According to the May 2020 IEP the parents were working on social communication with the student by helping her learn to email and text with family and friends (id.).

The May 2020 IEP also described the student's abilities regarding her physical development which included information from a March 2018 OT evaluation report (Dist. Ex. 1 at p. 7). The IEP noted that the student had deficits in processing, motor planning, and perceptual and visual motor skills which impacted the speed and efficiency in which she completed tasks and her ability to follow verbal instructions (id.). The May 2020 IEP stated that the student was independent with most necessary school related self-care tasks, but she required excessive time to complete such tasks (id.). According to the IEP, the student had age-appropriate grasp patterns, but completion of fine motor activities required time and effort (id.). The student's ability to track, fixate and dissociate the movement of her head and eyes was poor, and could significantly impact her perceptual and visual motor skills, particularly as they related to reading, writing, and copying skills (id.). Her writing, coloring, cutting, and drawing skills were below age-level (id.). The IEP noted that according to Fit Learning, the student was working on certain components of handwriting, such as small versus large letters, as well as straight lines and circles (id. at pp. 7-8). She was also reported to be working on cell phone skills (id. at p. 7). With regard to physical development needs, the IEP stated that the student needed to improve her fine motor skills (id. at p. 8).

Based on the information reviewed by the May 2020 CSE the resultant IEP identified a number of the student needs with respect to academics, social abilities, and physical development (Dist. Ex. 1 at pp. 6-8). Despite reports that the student was "talking a lot more" at Fit Learning, responding to positive praise and opportunities to earn a break, and making progress regarding her fluency skills, attention, and task compliance, the IEP stated that the student needed a very structured approach that included frequent reinforcement and praise of her efforts (id. at p. 6). It further stated that the student needed a great deal of redirection to maintain attention and on task

behavior and her noncompliant behavior was noted to be an issue that was more likely to occur under conditions of fatigue or frustration (id.).⁹ The IEP reflected the parent's report that the student liked the satisfaction and acknowledgement of successfully completing a task (id.).

With the information provided, the May 2020 CSE also determined that the student needed to improve her oral motor control for speech production, and build upon her receptive and expressive language skills, as well as her reading decoding skills, sight word vocabulary, encoding abilities, and her comprehension skills (Dist. Ex. 1 at p. 6). The IEP also noted that the student needed to improve her mathematics skills including money skills and place value, and also her pre-vocational skills (id.).

To address the student's needs related to maintaining attention, focus, and on task behavior, the May 2020 CSE recommended several resources and strategies including: a program with a small teacher-to-student ratio and minimal distractions; positive behavioral supports throughout the day with breaks earned for task completion/time on task; repetition and modeling; extended response time; verbal/nonverbal cues; scaffolding of directions; refocus/redirection; and visual aids (Dist. Ex. 1 at p. 8). The CSE also recommended 1:1 supplementary school personnel support for hallway transitions, lunch, adapted physical education, electives, and extracurricular activities (id.).

To address the student's academic, social, adaptive, and physical needs the CSE recommended 25 annual goals with accompanying benchmarks for reading, mathematics, communication, social/emotional/behavioral needs, motor skills and daily living skills (Dist. Ex. 1 at pp. 9-15).

Based on the information considered at the time and the discussion that ensued at the May 2020 CSE meeting, the CSE recommended the student for a 1:1 special class three periods (42 minutes) a day; an 8:1+2 special class one period every other day; a special class extended school day 8:1+2 two times per week for one hour and 30 minutes per class; adapted physical education in an 8:1+2 special class one period every other day; individual OT one period per week in the therapy room; individual speech-language therapy four periods per week in the therapy room; and individual vocational counseling two periods per day in the provider's office (Dist. Ex. 1 at p. 15).

For supplemental aids/modifications/and accommodations the May 2020 IEP included: extended response time; verbal/nonverbal cues to include visual, auditory, and tactile prompting; repetition and modeling; visual aids including the use of a visual schedule daily; supplementary school personnel to include an individual 1:1 daily for hallway transitions, lunch, adapted physical education, and electives; refocusing and redirection; breaks as needed between tasks to promote engagement/participation during instructional time; reteaching of materials—multimodal presentation as needed; supplementary school personnel-individual 1:1 for the duration of extracurricular activities in school; positive verbal praise with the opportunity to earn rewards; and scaffolding of directions during class periods (Dist. Ex. 1 at pp. 15-16). The CSE also recommended ten hours yearly of assistive technology consultation to begin trialing different

⁹ The May 2020 IEP indicated that despite the student's significant challenges she demonstrated the ability to engage socially and usually responded well to both tangible and social reinforcers (Dist. Ex. 1 at p. 6).

programs and 40 hours a year of in-school behavioral consultation (*id.* at p. 16). As will be discussed in greater detail below, the May 2020 IEP included a coordinated set of transition activities (*id.* at pp. 9, 17-18). The CSE recommended a 12-month program for the student consisting of 8 hours per week of 1:1 class daily for one hour and 36 minutes per class and individual speech-language therapy three sessions per week in the therapy room for 30 minutes per session (*id.* at pp. 16-17).¹⁰

The May 2020 CSE chairperson explained that the CSE recommended an individual aide for the student's transitions in the hallway, lunchtime, and any extracurricular activities because the setting was new to the student and the district wanted to ensure that she had support when navigating the school building (Tr. pp. 363-64). The June 16, 2020, prior written notice indicated that CSE considered recommending that the student be provided with "a 1:1 [s]upplementary [s]chool [p]ersonnel for the full day" but that option was rejected because the CSE agreed that the student did not require such support during special class periods or when services were delivered individually (Dist. Ex. 5 at p. 2). The CSE chairperson testified that the CSE recommended behavior consultation hours knowing that the student was coming to a new setting and having been largely "individualized prior to that (Tr. p. 364). She explained that the 40 hours were included as a bank of hours so they could be "front-loaded" or given at any time to the student and then determine if the positive behavior supports and classroom behavior system was enough or if the student need a functional behavioral assessment (Tr. pp. 364-65).

b. September 15, 2020 IEP

A CSE convened on September 15, 2020, for a requested review with the CSE chairperson, the director of pupil personnel services, a school psychologist, a special education teacher, a district speech-language pathologist, the assistant principal, a guidance counselor, and the parents in attendance (Tr. p. 383; Dist. Ex. 2 at p. 1). According to the meeting information summary the CSE convened for a web based audio conference to review the student's IEP and discuss the recommendations that were previously made at the annual review meeting in May 2020 since the district had been notified that the student was returning full time and they wanted to make sure that her services were in place and appropriate to meet her needs (Tr. pp. 383-84; Dist. Ex. 2 at p. 1). The CSE discussed having the student participate more in the 8:1+2 special class instead of receiving 1:1 instruction in school as a means of addressing the student's goals and reintegrating her into the school environment (Dist. Ex. 2 at p. 1). The high school special education teacher reviewed the various programs for reading, mathematics and writing used in the special class and the CSE discussed the behavioral supports provided within the classroom and how those supports related to the student's IEP recommendation for consultation (Dist. Ex. 2 at p. 1). The CSE also talked about what the student's schedule would look like in terms of a nine-period day (Tr. p. 389). The CSE chairperson testified that the committee maintained the recommendation for vocational counseling to acclimate and expose the student to prevocational type of tasks believing it was appropriate for the student and was consistent with the recommendations from the April 2020 psychological reevaluation report (Tr. pp. 390-91). The director testified that the extended day

¹⁰ The May 2020 IEP was intended to begin implementation with the 12-month program starting July 6, 2020 to August 14, 2020 and then for the regular school year commencing September 2, 2020 (Dist. Ex. 1 at p. 1). There is no indication in the hearing record that the student attended the summer portion of the extended school year.

was offered to provide an opportunity for the student to continue to work on academics, communication skills, and social-emotional skills two days per week for an hour and a half within the 8:1+2 special class (Tr. p. 81). Further, the director stated that the September 2020 CSE focused on building the student's schedule and to aligning her services, so she was accounted for throughout the school day (Tr. p. 82). The director explained that the CSE tried to find opportunities to pull the student into the 8:1+2 classroom while also maintaining compliance with the IEP as written in May 2020 (id.).

Ultimately, the September 2020 CSE maintained the original recommendations and goals made at the May 2020 CSE meeting but added a daily 42-minute period of 8:1+2 special class (Tr. pp. 388-89; compare Dist. Ex. 1 at p. 15 with Dist. Ex. 2 at p. 15; Dist. Ex. 6 at p. 1).¹¹ Likewise, the student's goals, management strategies, supplemental supports, modifications, and accommodations all remained the same as stated in the May 2020 IEP (compare Dist. Ex. 1 at pp. 8-17 with Dist. Ex. 2 at pp. 7-17). The September 2020 CSE chairperson testified that the committee agreed that based on the May 2020 meeting they had an appropriate program to meet the student's needs (Tr. p. 388).

c. December 4, 2020 IEP

Consistent with the September 2020 CSE's recommendation to reconvene in six to eight weeks to review the student's transition to the district as well as her programs and services, a CSE met on December 4, 2020 (Tr. p. 401; Dist. Ex. 3 at p. 1). The participating members of the December 2020 CSE included the district chairperson, the assistant principal, a school psychologist, the student's special education teacher, the student's speech-language pathologist, the parents, the student's private ABA home provider, and the attorneys for the district and the parents (Dist. Exs. 3 at p. 1; 7 at p. 1). According to the December 2020 prior written notice and the chairperson's testimony, the CSE had no new reports, but the committee considered the September 2020 IEP, the April 2020 psychological reevaluation report, and the December 2020 CSE discussion, which according to the hearing record included a discussion of the student's current levels of performance by her service providers (Tr. pp. 403-04; Dist. Ex. 7 at pp. 1-2).

The CSE chairperson testified that she had done informal classroom observations and from the staff's perspective the student "loved" being in the classroom and there were no significant compliance issues (Tr. p. 399). She noted that the only concern brought to her attention prior to the December 2020 CSE meeting was that the student preferred to stay "within the whole classroom rather than be pulled out of the classroom" (Tr. pp. 399-00). The CSE chairperson indicated that prior to the December 2020 CSE meeting there had been many conversations outside of the CSE meeting with the team, parents, and the home ABA therapist who all seemed to agree with respect to what the student needed to work on (Tr. pp. 404-05). The CSE chairperson conveyed that there were attempts to discuss curriculum and programming to the extent that they

¹¹ According to the hearing record, the CSE members agreed that the committee was not going to address the student's annual goals and that the goals from the May 2020 CSE meeting would be maintained until the teachers got to know the student better (Tr. p. 185). The September 2020 IEP indicated that the student's goals would be revised at a future CSE meeting in accordance with the student's performance at that time (Dist. Ex. 2 at p. 1).

were relevant to the annual goals but that the CSE "did not dictate the programs and curriculum for the special education teachers " (Tr. p. 405).

The December 2020 CSE updated the present levels of performance from the previous IEP of September 2020 (compare Dist. Ex. 2 at pp. 4-7 with Dist. Ex. 3 at pp. 5-7). With regard to the student's speech-language development, the updated IEP indicated that her mean length of utterance ranged from 1.8 to 2.4 words and her verbal spontaneous lexicon was composed mostly of nouns (Dist. Ex. 3 at p. 5). The student was able to answer simple who and what questions, with the concept of where emerging (id.).¹² The IEP indicated that during school-based therapy, the student was able to label common items and provide the category and function of an object (id.). The IEP reiterated the concerns regarding the student's tone and oral musculature (id.). As an update to the previous IEP, the December 2020 IEP indicated that, with respect to reading, the student could identify the name and sounds for 20 letters of the alphabet with automaticity, but had some difficulty with letter identification and/or sound formation for specified letters (id.). The IEP indicated that despite her mastery of vowel sounds, when provided with CVC words the student was unable to consistently identify a rhyming word (id.). The IEP noted that the student was able to read some familiar CVC vowel-consonant-e words, but she had difficulty identifying vowel sounds as long or short (id.). Further, the IEP indicated that when presented with a controlled text the student read with limited fluency and had difficulty returning to the text to locate answers to literal questions about what she had read (id.). In addition to the previously reported February 2020 WIAT-III results, the December 2020 IEP noted that the student read with limited fluency on a first-grade reading comprehension passage, was not able to self-correct errors without teacher prompts and was not able to answer any comprehension questions about the reading passage presented (id.). With respect to writing, the December 2020 IEP reported that the student's handwriting was composed of a combination of uppercase and lowercase letters, and that she was unable to independently spell single syllable words composed of CVC, digraphs, or blends (id.). In mathematics, the December 2020 IEP indicated that in addition to her previously reported performance on the WAIT-III, the student required manipulatives to solve single digit addition and subtraction problems within 10 (id.) The student was able to identify a numeral up to 50 when given its name, but she was not able to fluently skip count by five or ten or identify ordinal number positions (id.).

With respect to cognitive and daily living skills the December 2020 IEP repeated information found in earlier IEPs from the April 2020 private psychological reevaluation report, the Assessment of Adaptive Behavior Skills and reiterated that the student required a structured approach with frequent reinforcement and praise of her efforts and redirection to maintain attention and on task performance (compare Dist. Ex. 2 at pp. 5-6 with Dist. Ex. 3 at pp. 5-6). Additionally, the December 2020 IEP noted that the student was able to identify some common kitchen appliances and tools found in the kitchen and on informal assessment in class she showed she was able to identify measuring cups upon request and measure both solids and liquids with minimal prompts (Dist. Ex. 3 at p. 6). The student was reported to be working on following a one to three step recipe independently and identifying the tools and ingredients needed for recipes each month

¹² The December 4, 2020 present levels of performance repeated the student's results of the Comprehensive Receptive and Expressive Vocabulary Test-Third Edition as stated on the September 2020 IEP (compare Dist. Ex. 2 at p. 5 with Dist. Ex. 3 at p. 5).

(id.). The IEP indicated that the student needed to continue to expand her knowledge and function of kitchen tools and appliances and her understanding of safety rules and safety behaviors in the kitchen (id.).

Regarding the student's career/vocational/transition performance, the December 2020 IEP was updated to reflect that the student was able to follow simple steps to complete vocational tasks and worked best when given a visual/written checklist for task completion (Dist. Ex. 3 at p. 6). The IEP noted that the student did not always ask for help when needed and sometimes needed a verbal prompt to remind her to ask for help during a task and for pacing (id.). Additionally, the IEP noted that the student did not always stay on task and at times did not start tasks when given directions to begin (id.).

The December 2020 IEP indicated that the student's needs with respect to academic and functional abilities included the need to: improve her reading decoding skills, sight word vocabulary, and encoding abilities; build upon her comprehension skills; improve her mathematic skills, including computation, money skills and place value; learn pre-vocational skills such as initiating tasks and appropriately seeking assistance; and increase her abilities in activities of daily living, such as independent meal preparation and safety awareness (Dist. Ex. 3 at p. 6). Regarding the student's needs, the parents expressed concern with the use of the Unique Learning System curriculum, the district's selected math program, the lack of baseline information, and staff training in implementing curriculum/programs (id.). However, the parents expressed satisfaction with the student's speech-language services and agreed with changes to the speech-language goals (id.). In addition, they indicated that the student had transitioned well to the high school and that she was happy to go to school (id.).

With regard to the student's social development, the IEP echoed the parent's sentiment, noting that the student made an "excellent" transition to the high school, appeared happy and comfortable in her classroom setting, and engaged appropriately with her peers using their names to greet them in the morning (Dist. Ex. 3 at p. 6). According to the IEP, the student had good relationships with the adults that she worked with, however, at times she exhibited non-compliant behavior such as refusal to do a requested tasks or "in rare instances" crying but could be redirected with moderate verbal prompting or the use of reinforcers such as earning a preferred break activity (id. at pp. 6-7). The student also was an enthusiastic participant in extracurricular activities at the high school (id. at p. 7). With respect to social development, the IEP indicated that the student needed to work on developing language associated with negative feelings; increase her functional communication when she was frustrated, sad, disappointed, or fatigued; and connect her feelings with what was happening in order to replace non-compliant behavior and learn how to cope with performing non-preferred tasks (id.). The parents expressed that they were pleased with the student's participation in extracurricular activities (id.).

With respect to the student's physical development, the December 2020 IEP reiterated the results of the March 2018 OT evaluation which identified the student's deficits in processing, motor planning, and perceptual and visual motor skills, which impacted the speed and efficiency with which she completed tasks and her ability to follow verbal instructions (Dist. Ex. 3 at p. 7). The December 2020 IEP identified the student's need to improve her fine motor skills (id.).

To address the student's needs the December 2020 CSE recommended a continuation of the management strategies found in the September 2020 IEP (compare Dist. Ex. 2 at p. 7, with Dist. Ex. 3 at p. 7). The IEP also maintained the recommendation for the student to be provided with supplementary school personnel (1:1) for hallway transitions, lunch, adapted physical education, electives, and extracurricular activities (id.). Additionally, the December 2020 IEP noted that the student required wait time to process verbal directions, that verbal demands/directions should be presented clear, short utterances, and that staff should provide the student with adequate wait time before additional verbal prompts are given (id.).¹³

The December 2020 CSE recommended 36 goals with accompanying benchmarks to address the student's needs in reading, writing, mathematics, communication, social development, and motor skills (Dist. Ex. 3 at pp. 9-16).¹⁴ All of the student's core academic goals were modified to include "during one on one instruction" as a condition (id. at pp. 9-12). According to the testimony of the special education teacher the CSE reviewed the student's annual goals and based on staff and parent observations, decided what would be appropriate going forward and then broke the goals down into more specific components (Tr. pp. 1147-49).

Ultimately, the CSE recommended that the student attend an 8:1+2 special class and receive 1:1 instruction by a special education teacher/teaching assistant for reading/writing, mathematics, and vocational skills for five periods per day (Dist. Ex. 3 at p. 17). In addition, the CSE recommended that the student attend an 8:1+2 special class two periods per day; and an 8:1+2 adapted physical education class one period every other day; alternating with an 8:1+2 special class one period every other day (Dist. Ex. 3 at p. 17).¹⁵ With respect to related services, the CSE recommended individual OT one period a week in the special class and individual speech-language therapy four periods per week in the therapy room (id.). The CSE made no changes to the supplementary 1:1 aide or the services/program modifications and accommodations recommended in the prior IEP (compare Dist. Ex. 2 at pp. 15-16 with Dist. Ex. 3 at pp. 17-18). Similarly, the CSE maintained the recommendation for supports for school personnel on behalf of the student including 10 hours of assistive technology consultation and 40 hours of behavioral consultation

¹³ The postsecondary goals, needs, and transitional activities, which remained the same in both the September 2020 and December 2020 IEPs, will be discussed in greater detail below (compare Dist. Ex. 2 at pp. 8-9, 17-18 with Dist. Ex. 3 at pp. 8-9, 19-20).

¹⁴ Noting that the purpose of the December 2020 CSE meeting was to focus on the student's goals, the CSE chairperson indicated that committee members went "line by line" through every goal taking into account the participants thoughts, formal and informal data from the ABA therapist and the school team, concluding with agreement on the goals in the IEP (Tr. p. 405). The CSE also discussed the using the Foundations program for reading and writing and the Equals program for mathematics (id.). According to the IEP, the parents were not in agreement with the recommended mathematics program, and wanted the teachers to use Everyday Math (Dist. Exs. 3 at p. 1; 7 at p. 1). The IEP stated that further discussion was not pursued as the committee could not dictate the specific methodology used by the teachers (id.). The CSE meeting information summary indicated that despite the disagreement regarding the math program the committee did agree on the student's mathematics goals (id.).

¹⁵ The student's teacher testified that at the December 2020 CSE meeting "the decision was made" that the student would be more integrated into the classroom setting while receiving her 1:1 instruction (Tr. pp. 1147-48, 1158). The teacher reported that it was also decided to use the Foundations reading program and, as she was certified in the Wilson Reading System, she would work with the student 1:1 on reading instruction (Tr. p. 1158).

per year and the addition of team meetings with the parent one time per month (Dist. Ex. 3 at p. 18). The CSE again recommended a 12-month program and services consisting of a 1:1 special class for eight hours per week (daily for 1 hour and 36 minutes) and individual speech-language therapy for three 30-minute sessions per week in the therapy room (*id.* at pp. 19-20).

2. 1:1 Instruction: Implementation and Appropriateness of CSEs' Program Recommendations

Concerning the student's 1:1 instruction, the parents originally alleged a claim related to the implementation of the instruction (Parent Ex. A at pp. 8, 10, 12). The IHO reframed the issue in his decision by analyzing the degree to which the CSE predetermined its recommendation for 1:1 instruction and ultimately found that the CSE did not recommend sufficient 1:1 instruction. As a result, the issues concerning the district's implementation of 1:1 instruction for the student have become, on appeal, entwined with the question of the appropriateness of the CSEs' substantive recommendation for 1:1 instruction. Bearing in mind the IHO's treatment of the relevant claims in his decision, and upon my independent review of the hearing record, I will discuss the totality of the issues pertaining to 1:1 instruction below.

Specifically, as summarized above, the IHO found that the "credible evidence" suggested that the "student required individual instruction" (IHO Decision at p. 13). In connection with the 1:1 instruction, the IHO discussed that the student's schedule was changed in November 2020 to remove the 1:1 special class, and instead to provide the student with 1:1 instruction in her 8:1+2 class, although the CSE meeting formalizing this change in location of the delivery of the 1:1 instruction did not occur until December 2020 (*id.* at p. 11). The IHO found "that the December 4, 2020 meeting was not a meeting to discuss a change but rather a pro forma meeting to align the IEP with the determination that was made outside of the CSE meeting" (*id.*). The IHO found that there were "a number of evaluations" that indicated the student should not work with a teacher's aide and that 1:1 support in a small classroom was "not sufficient given [the student's] needs" (*id.* at p. 12). Next, the IHO discussed that the district had "difficulty in implementing the IEP either as a function of obtaining and retaining credentialed staff or just the complexity of such a program" (*id.*). However, the IHO held that without holding a CSE meeting before changing the student's program, the "[d]istrict undermined [the] [p]arent[s]' participation in the process and denied FAPE" (*id.*).

Initially, with regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]; *see also* Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Accordingly, in reviewing failure to implement claims under the IDEA, courts have held that it must be ascertained whether the aspects of the IEP that were not followed were substantial or "material" (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; M.L. v. New York City Dep't of Educ., 2015 WL 1439698, at *11-*12 [E.D.N.Y. Mar. 27, 2015]; *see* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007] [holding that a material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled student and the services required by the student's IEP]; *see*

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

The district contends that in November 2020 there were staff changes and it wanted "to have all [d]istrict providers overseeing and providing services as part of [the student's] program (rather than continue to use multiple agencies)" (Req. for Rev. ¶ 9). As a result, this caused changes in the student's schedule and a change in the location of the student's 1:1 academic instruction (id.). During this time according to the district, a discussion was held with the parents regarding the change in location of the 1:1 instruction (id.). Therefore, the district asserts it "trialed" the 1:1 academic instruction in the 8:1+2 special class (id.). Further, the district asserts that it was "always clear with the [p]arents that [the student] would receive 1:1 academic and vocational instruction from a qualified teacher, but that the location of that 1:1 instruction would change" (id. ¶ 10). The change in the 1:1 academic instruction occurred at the December 2020 CSE meeting after "extensive discussion" and review of available data (id.).

The private neuropsychologist's second reevaluation of the student in took place in April 2020 while the student was still enrolled in Fit Learning (Parent Ex. D at p. 1).¹⁶ The neuropsychologist noted that the student's program was comprised of both 1:1 and small group instruction and he included an observation of the student being instructed in a 2:1 setting in his evaluation report (Parent Ex. D at pp. 2, 3). The neuropsychologist reported that the student's cognitive abilities were consistent with her performance during her previous evaluations and indicated that the student's academic skills were at a mid-kindergarten level, which was also similar to his findings in 2018 (compare Parent Ex. C at p. 6, with Parent Ex. D at p. 5). However, the neuropsychologist noted that the student had demonstrated significant behavioral progress in the Fit Learning program (Parent Ex. D at pp. 2, 5). Based on his evaluation, the neuropsychologist concluded that the student "require[d] continued placement in a small, structured, supportive, and

¹⁶ The hearing record shows that the student was evaluated three times by a private neuropsychologist; the first time in May 2016, the second time in July 2018 and the third time in April 2020 (see Parent Exs. B; C; D; Dist. Ex. 20). At the time of the May 2016 evaluation the student was attending a 12:1+2 special class where she received 1:1 instruction for reading and mathematics (Parent Ex. B at p. 3). According to the neuropsychologist, the student's teacher reported that she did best when provided with 1:1 instruction with the use of a reward system (Parent Ex. B at p. 3). Based on his evaluation, the neuropsychologist concluded that the "most appropriate, least restrictive educational placement" for the student was "a special education setting with a small teacher to student ratio (such as her current 12:1:2 class size) . . . with intensive related services" (Parent Ex. B at p. 8). The neuropsychologist indicated that the student should continue to work 1:1 and within the classroom with a reading specialist who was experienced at working with students with Down Syndrome (id.). He opined that the student should not work with a teacher's aide who was untrained to work with student's with highly specialized learning needs (id.). When the neuropsychologist reevaluated the student in July 2018 the student was receiving 1:1 instruction from Fit Learning (Parent Ex. C at p. 1). Based on his assessment, the neuropsychologist reported that the student's cognitive scores were generally consistent with her performance in 2016 and that "gradual improvement [wa]s evident across academic areas in comparison to her 2016 evaluation" (Parent Ex. C at p. 6). The neuropsychologist opined that the student required continued placement in a small specialized, 1:1 academic setting and stated that the student did not yet have the requisite skills for learning in a less restrictive environment (Parent Ex. C at p. 7). He indicated that a larger classroom would not allow the student to continue to make the growth she had been making in her then-current program (Parent Ex. C at 7).

highly specialized academic program" (Dist. Ex. 20 at p. 6). The neuropsychologist noted that the student had "responded well to a highly structured, data-driven approach" and that she continued to require a program that employed ABA principles and scientifically based methods (Parent Ex. D at p. 6). He opined that "[g]iven [the student's] behavioral and academic needs, it [wa]s imperative that she continue to receive 1:1 direct instruction in reading and mathematics from a trained special educator" and indicated that 1:1 support from a paraprofessional or trained aide, even within a small class, was not sufficient (Parent Ex. D at p. 6). The neuropsychologist recommended one to two hours daily of 1:1 academic instruction in order for the student to make appropriate progress but also indicated that the student's "attentional and self-regulation needs necessitate[d] a setting with a small [student-teacher] ratio" (id. at p.7).

The private neuropsychologist confirmed that in his April 2020 evaluation report he recommended a "small learning environment that afford[ed] one-on-one direct instruction" for the student (Tr. pp. 1910, 1927-28). He noted that the emphasis was on 1:1 instruction and "whether that could be attempted and done and tried within a small classroom was an option, but to do that without the [1:1] trained instructor was not what I was recommending" (Tr. pp. 1927-28). The neuropsychologist testified that having been a paraprofessional and having worked with aides and assistants, his experience was that they did not have the training and specialization to work with a student with this level of need (Tr. pp. 1918-19). He opined that the student could not make meaningful progress without a trained special educator (Tr. p. 1919).

The district's assistant principal testified that the May 2020 CSE discussed the appropriateness of the student receiving 1:1 instruction versus instruction in an 8:1+2 special class (Tr. pp. 673-74). She explained that the discussion revolved around whether to transition the student to an 8:1+2 special class at that time or maintain the student in 1:1 instruction with the hope that she would transition to a more comprehensive program with peers, as the 1:1 special class was "very restrictive" (Tr. pp. 674-76; see Tr. pp. 101-04). At the May 2020 CSE meeting, the district's CSE chairperson testified that it was the intent to "phase" the student out of 1:1 instruction which was discussed with the parents (Tr. pp. 101-03, 105-06, 206; see Tr. pp. 633-35, 639-41). The district's director of pupil personnel services testified that the May 2020 CSE recommended a 1:1 special class "based upon reports over the past 4 years provided by Fit Learning" and the CSE "did not feel comfortable overriding something when they had not had her in district yet at this points [sic] so the recommendation was to maintain the 1 to 1 and come back to committee and reevaluate once she came into district" (Tr. pp. 193-94, 307; see Tr. pp. 674-76). The CSE chairperson testified that the student was transitioning from four years of 1:1 instruction to a district program (Tr. p. 357). By way of further explanation regarding the CSE's recommendations the assistant principal testified that "because we didn't have more information than what was in front of us and the evaluations and the information from [Fit Learning], the program was created to have the special class 1[:]1 three times daily" (Tr. p. 674). As a result, the May 2020 CSE "recommended a combination for the transition period of [8:1+2] within the group, as well as 1 to 1 periods" (id.). She further testified that since this was a transition period, the CSE was unsure how the student's goals would be met in a group setting so the CSE wanted to start with 1:1 instruction in a special class and then consider a group later after the student acclimated to the district's program (Tr. pp. 358; see Tr. pp. 634-35). This recommendation she testified was based on the district's evaluations, Fit Learning, and the April 2020 private

neuropsychological reevaluation (Tr. pp. 358-59).¹⁷ The CSE chairperson testified that the basis for the mixed recommendation was that at Fit Learning all of the student's academics were 1:1 with a little group social time, however, the student was very social so the CSE "wanted her to have the opportunity to kind of transition back and give her the 1 to 1 support and then see how she also functioned within the group setting.... [and] come back after the first quarter to review [the student's] IEP" (Tr. p. 362). This allowed the student the opportunity to work on "generalization of skills in a whole group setting and socialization" (Tr. p. 363; see Tr. p. 674).

The district's director testified that there was "a very strong benefit" to the student being educated in an 8:1+2 special class with her peers "as opposed to [having a] one to one schedule throughout the day" (Tr. pp. 83-84). She testified that peers learn from one another, and the student knew many of the other students in the 8:1+2 special class and "[h]er skill set was on par with her peers" (Tr. p. 84). She testified that the student was "a very social child [and] from a social, emotional perspective, as well as an educational perspective, to have other peers who ha[d] similar goals to [the student] and opportunities to learn with them [wa]s very important" (Tr. p. 261).

Next, at the September 2020 CSE meeting, the CSE discussed the student "participating more in the 8:1+2 special class, as opposed to the 1:1 instruction in school to address her goals and reintegrate her within the school environment" (Dist. Ex. 2 at p. 1). According to the meeting information summary the CSE considered having the student "participate fully in the 8:1[+]2 [special] class but the parents wanted the student to receive the 1:1 special class instruction as recommended in the May 2020 IEP (id. at pp. 1-2). The September 2020 CSE agreed to maintain the same 1:1 special class recommendation as the May 2020 IEP but also to build in opportunities for the student to be in the 8:1+2 special class and so the student could gain access to her peers (Tr. pp. 85, 385-86; Dist. Ex. 2 at pp. 1-2). The director testified that the CSE meeting included discussion 'surrounding the fact that the 8:1[+]2 inherently provide[d] opportunities for individualized instruction within the classroom" (Tr. p. 255). The CSE discussed that within the 8:1+2 classroom sometimes students required 1:1 instruction to meet their IEP goals and other times required instruction in a dyad or in small groups (id.). The director recalled a discussion at the September 2020 CSE meeting regarding the fact that after four years at Fit Learning receiving 1:1 instruction the student was at the same levels in reading and math as when she started in the program which called into question whether that teaching methodology (ABA) and program met the student's needs (Tr. pp. 257-58).

According to a schedule developed by the district, beginning on September 29, 2020 and continuing through November 6, 2020, the student was provided three periods of 1:1 academic instruction daily and two periods of 1:1 vocational instruction in a special class outside of the 8:1+2 special class (Parent Ex. M at pp. 14-15; Dist. Ex. 30 at pp. 2-3).¹⁸ The district hired a special education teacher to provide 1:1 instructional services to the student beginning September 29, 2020, who worked with the student until November 6, 2020 (Dist. Exs. 30 at p. 5; 33 at pp. 9-

¹⁷ The student's mother testified that she shared a lot of data and documents from the private neuropsychologist, Fit Learning, and a private speech-language pathologist with the CSE (Tr. pp. 1964-65).

¹⁸ According to the schedule of provided services, the district's contracted vocational instructor provided services beginning on September 29, 2020 and through November 4, 2020 (see Parent Ex. M at pp. 14-15).

14). The director of pupil personnel services testified that the teacher had a master's degree and was qualified to work as a special education teacher but was awaiting certification approval by New York State, as her certification was pending under the COVID rules (Tr. pp. 244-45; see Parent Ex. M at pp. 14-15).

Later, in November 2020, the district's director testified that she had conversations with the student's mother about having the student more involved in the 8:1+2 special class and for her to also receive 1:1 instruction in a more "cohesive" program with district providers (Tr. pp. 101-06). She testified that the program at the time, which included 1:1 special class for academics, was "disjointed" and not "best practice" for the student (Tr. pp. 102, 104). She testified that she wanted to see the student "be educated within the [8:1+2] classroom even if it [was] individual instruction with[in] the [8:1+2] classroom" (Tr. p. 104). Also, in November 2020, the district's director of pupil personnel services testified that she spoke with the student's mother about hiring a certified teacher as a teaching assistant to work "under the direction of the classroom teacher" to provide the student with 1:1 instruction in the 8:1+2 special class (Tr. pp. 105-06). She testified that the student's mother was "receptive" to this concept but wanted to ensure that the teaching assistant was a certified special education teacher (Tr. p. 106).

Next, on November 9, 2020 another provider was hired to provide 1:1 instruction in the 1:1 special class until November 22, 2020 (Parent Ex. M at p. 15; Dist. Ex. 30 at p. 3).¹⁹ The new special education teacher provided 1:1 academic services to the student for the same three consecutive periods as the previous teacher (Tr. p. 250; Parent Ex. M at pp. 14-15). Additionally, a new district-contracted vocational instructor provided services for the same two consecutive periods as the previous 1:1 vocational instructor (Parent Ex. M at p. 14-15).

A teaching assistant was hired on November 23, 2020 to provide the student with 1:1 instruction (Tr. pp. 251-52; see Parent Ex. M at p. 15).^{20, 21} From that date and until the student left the district on January 22, 2021, the student received 1:1 instruction in the 8:1+2 special class by either the special education teacher or the teaching assistant who carried out the "lessons under the direction of" the special education teacher together with a vocational special education teacher who provided the vocational instruction (Tr. pp. 207, 250-51, 292; Parent Ex. M at pp. 15-16; Dist.

¹⁹ According to the testimony of the district's director, this individual was a certified special education teacher (Tr. pp. 248-49).

²⁰ A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6[b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). Teaching assistants must meet certain licensure and certification requirements (8 NYCRR 80-5.6[c][2]).

²¹ According to the teaching assistant's resume, she held a master's level degree in special education and held certifications in pre-K through grade six as well as certification in students with special needs grades one to six (Parent Ex. M at pp. 30-33). The resume also indicated the teaching assistant had experience as special education teacher in a 6:1+3.5 ABA classroom with students ages 14-18 and a 10:2+3 TEACCH self-contained classroom with students five to ten (id. at p. 31). Her experience also included conducting functional behavior assessments and providing home-based instruction to students using ABA/discrete trial teaching (id.).

Ex. 30 at pp. 3-5).²² The 8:1+2 special class had dividers and the student was pulled into a separate location in the classroom for the 1:1 instruction (Tr. pp. 293, 415; see Tr. pp. 1228-29). The 1:1 instruction was not provided by a teacher aide which was in accordance with the recommendation of the private neuropsychologist (Tr. pp. 304-05; see Dist. Ex. 20 at p. 6).²³ The district's director testified that although for the most part the student was in 1:1 instruction there were periods during the day when she did not have individual instruction and staff had the opportunity to see the student "interact and work with other students"(Tr. pp. 308-09). The director reported that coming into the November/December timeframe, staff had information that the student was able to "maintain her behavior in a really appropriate way" and that she was very social and liked to be with her peers (Tr. pp. 308-10). The director testified that because the student "worked well within that [8:1+2] setting" the CSE continued to recommend that the student be provided with the 1:1 instruction but "in a more naturalistic setting" that being the classroom with the other students (Tr. pp. 310-11). The director stated that the student "showed the ability to be able to learn within that setting" (id.). Further, based on the student's progress from September through December 2020 the academic special education teacher opined that it was better for the student to learn in a classroom setting rather than 1:1 (Tr. pp. 1241-45). When she observed the student working with peers in a group "she was engaged and motivated" (Tr. p. 1246). The CSE chairperson testified that the only concerns brought to her attention were that the student preferred to stay in the 8:1+2 classroom rather than being pulled out for individual instruction (Tr. p. 400). One of the student's 1:1 special education teachers testified that when the student had to come to her, she "often" would be crying, screaming, upset, or would sometimes hit because the student had to leave her classroom and she testified that the student "missed that socialization part of the class so that was hard for her to transition from the group to just individual learning" (Tr. pp. 1667-68).

During the December 2020 CSE meeting, the CSE recommended the student attend an 8:1+2 special class "with a dedicated 5 periods daily of 1:1 instruction by the special education teacher and/or teaching assistant in the areas of reading/writing, math, and pre-vocational skills" (Dist. Ex. 3 at p. 2). The director explained that the student's 1:1 instruction was not removed but the location of the instruction was changed from a private location to inside the 8:1+2 special class (Tr. pp. 207-09, 262). The director testified that the CSE's recommendation that the 1:1 instruction be provided by a certified teacher, or a teaching assistant was made to enable the district to provide 1:1 instruction within the 8:1+2 setting so that there was less transition between providers the program was more coordinated (Tr. p. 204). She stated that

upon reflection of the IEP that we put into place and multiple team meetings and conversations with the parents, the consensus was

²² The director confirmed that the new teaching assistant was not a 1:1 teaching assistant for the student, rather she was a teaching assistant for the whole class (Tr. p. 251-52). By adding her to the classroom staff the district had three "licensed" teachers cycling in and out of the classroom to ensure that the student could get 1:1 instruction as designated on her IEP (Tr. p. 252). According to the director, the student's 1:1 instruction was provided by either the new teaching assistant or one of the classroom teachers (Tr. p. 251). If one of the teachers was providing the 1:1 instruction the teaching assistant would work with other students in the classroom (Tr. pp. 251-52).

²³ A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "attending to the physical needs of children" and "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6[b]).

whether [the student's] needs would be better met if we didn't have so many transitions and so many varied providers involved, so we moved forward and hired this teaching assistant specifically for that classroom who could teach and provide new instruction under the direction of the special education teachers in the classroom so she could continue to receive 1 to 1 instruction in all areas as designated on her IEP

(Tr. p. 206).

More specifically, the hearing record shows that the December 2020 CSE "considered a 1:1 special class for [the student] for the 5 periods daily, but this option was rejected as it was not considered the least restrictive environment for the student" (Dist. Ex. 3 at p. 2). According to the meeting information summary, "It was discussed that [the student] [wa]s more motivated and engaged in her instruction/learning when she [wa]s in the classroom setting, as opposed to being isolated from her peers in a separate location (id.). The meeting information summary also noted that "[the private neuropsychologist] in his April 2020 evaluation stated that [the student] would benefit from 1-2 hours per day of 1:1 academic instruction in a small classroom setting." (id. at pp. 1-2). Furthermore, the CSE chairperson testified that at the December 2020 CSE meeting there were discussions about the student not participating in 1:1 instruction outside of the classroom because it was problematic as the student did not want to leave the classroom setting and then she was not "fully available" during the 1:1 instruction outside the classroom (Tr. pp. 405-07, 539). In response to this observed difficulty, the December 2020 CSE changed the IEP to reflect that 1:1 instruction would be provided in the classroom and a condition was added to the student's annual goals that indicated mastery would be measured with regard to the student's ability to perform the skill "during 1:1 instruction" (Tr. pp. 406-07). The chairperson testified that the move to 1:1 instruction in the classroom was intended to integrate the student into a larger group setting so she felt part of the class and the team believed that the student's goals could be met within the less restrictive classroom setting (Tr. pp. 421-22).

The meeting information summary indicated that the parents expressed dissatisfaction with the CSE's recommendation but agreed with the goals as discussed at the meeting (Tr. p. 415; Dist. Ex. 3 at p. 2).

The district's director testified that the students in a 8:1+2 special class have a group "mini lesson" that took place in the larger group and then based upon the students' areas of need they were pulled for individual instruction or 2:1 instruction and this "afforded [the student] that opportunity to be with her peers within an [8:1+2] setting and be pulled for the individual instruction that was designated on her IEP so she could be a member of the class" (Tr. pp. 264-65, 267-68, 294). The district's director testified that the CSEs did not say they would not provide the student with 1:1 instruction but the CSEs contention was that when 1:1 instruction was needed for the student it could be "provided within a classroom setting" (Tr. pp. 197-98). The student's academic special education teacher testified that the location of the 1:1 instruction was changed at the December 2020 CSE meeting because students in the 8:1+2 special class were working "towards independence postsecondary" and "a student learning in a group is always better than a student requiring one-on-one instruction" (Tr. p. 1244). She testified that the 8:1+2 "affords us the flexibility to allow for a mix of individualized instruction where it's appropriate and effective

and group work where it's so important in order for them to be successful adults in the community" (Tr. p. 1324). The district's academic special education teacher testified that in the first week of December 2020 the student's schedule changed, and she worked with the student 1:1 in reading and writing instruction and with the teaching assistant on math goals within the 8:1+2 special class (Tr. pp. 1103, 1139, 1145, 1149, 1158-61, 1269, 1315).

Regarding implementation, if, as the district asserts, the student was "trialed" on the 1:1 instruction in the 8:1+2 beginning on November 23, 2020, prior to the December 4, 2020 CSE meeting it was for only a few days with the teaching assistant (November 23-24). The hearing record shows that students were on Thanksgiving break from November 25-27 and returned to school on November 30th (Dist. Ex. 30 at pp. 3-4). In addition, the student was dismissed at 1pm on December first (Parent Ex. M at p. 164). Following the December 2020 CSE meeting, the student was dismissed early on December 8th and 15th, there was a snow day on December 17th, the student was on remote instruction from December 18th – 23rd, and holiday break began on December 24 and continued through January 4th which was the implementation date of the December 2020 IEP (Parent Ex. M at p. 16; Dist. Exs. 3 at pp. 1, 17; 30 at pp. 4-5). Accordingly, to the extent any implementation issues relating to the 1:1 instruction recommended on the September 2020 IEP occurred they were not material or substantial (A.P., 370 Fed. App'x at 205; M.L., 2015 WL 1439698, at *11-*12; see Van Duyn, 502 F.3d at 822). Moreover, rather than establishing predetermination, the foregoing evidence demonstrates that the district approached the student's need for 1:1 instruction with an open mind and developed the student's programming in such a way as to achieve the balance of individual support and inclusion in the special class setting with peers; indeed, the CSE continued to recommend 1:1 instruction for the 2020-21 school year while also evaluating and modifying the appropriate location for the delivery of the 1:1 instruction throughout the CSE process (i.e. initially recommending a special class location and then recommending delivery in the 8:1+2 class). In making its recommendations, the CSE balanced her need for 1:1 instruction while also accommodating her needs for socialization and attending a group educational setting with peers based, in part, on observations by her teachers and providers of how she was functioning within the recommended program. Accordingly, the IHO erred to the extent that he found the CSE engaged in predetermination with respect to its recommendations for the student's 1:1 instruction.

Regarding the general appropriateness of the CSEs' recommendations, the hearing record demonstrates that the September 2020 IEP and the December 2020 IEPs, which were in place during the time that the student was in the district program, were developed using multiple sources of information including evaluations, provider reports from both district and private providers, and parent reports. The September 2020 IEP provided the student with 1:1 instruction in academics, vocational skills, and related services. The September 2020 IEP included multiple management strategies and accommodations to support the student with her attention, processing, and behavior, including a 1:1 aide for extracurricular activities and a behavior consultant to support the staff with respect to the student's behavior management. After attending the district program for several weeks, the December 2020 CSE convened and adjusted the student's program and goals based on her performance in the school setting. The resultant IEP maintained the student's need for 1:1 instruction but modified the setting in which it was to be provided to the 8:1+2 classroom, rather than in a separate location, based on the student's performance.

While the district is required to consider the recommendation from a private evaluator, a CSE is not required to adopt all or any of the recommendations from such evaluations. In this case, consistent with the April 2020 psychological reevaluation report, the September 2020 and December 2020 IEPs included recommendations for 1:1 direct instruction from a trained special educator in reading and mathematics, initially in a separate location but then within the classroom setting and the program allowed for access to direct 1:1 instruction throughout the school day in a small classroom setting (Parent Ex. D at p. 6; Dist. Exs. 1 at p. 15; 2 at p. 15). As recommended in the April 2020 psychological reevaluation report the IEPs provided for a program that addressed her functional and daily living skills to support her developing independence and also, provided for community-based activities through her involvement in extracurricular activities (Parent Ex. D at p. 6; Dist. Exs. 1 at pp. 15-16, 18; 2 at pp. 14-16, 18). As a result, given the context of the student's parallel needs for socialization, developing independence and her growing ability to function in a classroom with peers, to the extent the IHO found that the district failed to recommend substantively appropriate 1:1 instruction, such determination was also in error.

3. Speech-Language Therapy: Implementation

The IHO found that the speech-language therapy services provided to the student failed to "conform" to the May 2020 IEP (IHO Decision at p. 12). However, in rendering his decision the IHO relied solely on the testimony of the student's 1:1 aide regarding the delivery of speech-language therapy and failed to reference any of the testimony of the district's speech-language pathologist who actually delivered the speech-language services to the student (Tr. pp. 841-77, 883-1033; see IHO Decision at pp. 12-13). In this regard, the IHO failed to consider all of the evidence in the hearing record and his finding that the student's speech-language therapy was not provided in accordance with the IEP cannot be sustained.

The district speech-language pathologist testified that she began working with the student in October 2020 (Tr. pp. 852, 908; see Dist. Ex. 35).²⁴ She reported that the September 2020 CSE considered providing push-in speech language therapy as a means of addressing the student's conversational speech goal but that option was rejected because the parents wanted the student to continue with individual speech (Tr. pp. 906-07; Dist. Ex. 2 at p. 2). The CSE continued to recommend the student for four 42-minute sessions per week of individual speech-language therapy in a therapy room (Dist. Ex. 2 at pp. 1, 15). This recommendation continued on the December 2020 IEP (Tr. pp. 946-47; Dist. Ex. 3 at pp. 1, 17).²⁵

The parents argue that the student's speech-language therapy was provided on a push-in basis in the classroom and sometimes in a group, rather than individually as called for on her IEP (Answer at p. 3). However, the parents' arguments solely rely on the testimony of the 1:1 aide and fail to consider the testimony of the student's speech-language pathologist (id. at pp. 3-4). The student's 1:1 aide initially testified that "[a] lot of times speech was pushed into the classroom,"

²⁴ The hearing record shows that the student's speech-language therapy was initially provided by an outside agency beginning on September 29, 2020 and ending on October 23, 2020 (Tr. pp. 908-09; see Dist. Ex. 33).

²⁵ The speech-language pathologist testified that during the review of the IEPs in question she adjusted a group goal because she never worked with the student in a group as the student received four individual sessions (Tr. p. 899).

but later testified that she did not recall saying that (Tr. p. 1345,1404-05). With regard to daily instructional periods she indicated that "[s]peech sixth period might have been a push in for the speech pathologist . . . class speech or a group speech lesson" (Tr. p. 1361). She reported that often the speech pathologist "would come in and do a group lesson with a conversation" (Tr. pp. 1361, 1406). The student's 1:1 aide estimated that after November 30th the student received speech four times per week, three pull-out sessions and one push-in (Tr. pp. 1449-50). She stated that she would not assume that the push-in session was provided in a group "every single time" and indicated that that would be a question for the speech-language pathologist (Tr. p. 1450). When asked if it was okay to assume that the student's speech therapy "was not a pull-out every time" the 1:1 aide responded that she knew the speech-language pathologist came into the classroom and that "maybe there was another group speech in addition to her four pull-outs" (Tr. p. 1450). She further indicated that "that would be a question for the speech pathologist. I don't want to make a definitive answer if I'm not 100 percent sure" (Tr. p. 1450).

The district speech-language pathologist testified that she had to change an annual goal related to the student engaging in structured conversations with peers because she "never worked with [the student] in a group . . . because she had individual sessions" (Tr. p. 899). She indicated that she brought the need to change the goal to the attention of the CSE because [the student] got four individual sessions . . . when she was here" (Tr. p. 899).

Based upon the foregoing, the IHO's finding that the district did not properly implement the May 2020 IEP with respect to speech-language therapy is not supported by the evidence in the hearing record.

4. Methodology

Within the parents' due process complaint notice, the issue relating to methodology was framed in terms of challenges to the recommendations in the IEPs (see Parent Ex. A at pp. 16-17). The IHO sua sponte re-framed the issue, addressing instead the degree to which the district predetermined its recommendations (see IHO Decision at pp. 13-15). Specifically, the IHO found predetermination in the district's failure to consider a specific methodology on the student's IEP (IHO Decision at p. 14). The district asserts that it is not required to recommend a specific methodology on the student's IEP and methodology is left to the discretion of the teacher and related service providers (Req. for Rev. ¶ 16). In addition, the district asserts that the CSEs discussed that the ABA and PROMPT methodologies were "good components" of the student's program but not required for the student to make progress (Tr. p. 553; Req. for Rev. ¶ 16).

The precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94).

Where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

In April 2016, the private neuropsychologist recommended "sufficient scaffolding" during the student's 1:1 academic instruction "in the form of cueing, repetition, supplemental teaching trials and clarification of instructions" (Parent Ex. B at pp. 8-9). The private neuropsychologist found that the student learned "best when a multi-modal approach [wa]s implemented for learning" (id.). Later, in April 2020 the same private neuropsychologist wrote that the student "responded well to a highly structured, data-driven approach, and continue[d] to require a program that utilize[d] ABA principles and scientifically-based methods" (Parent Ex. D at p. 6). Further, in connection with PROMPT therapy, at the time of the April 2016 private psychoeducational evaluation the student was receiving PROMPT therapy in school and privately at home (Parent Ex. B at p. 1). The neuropsychologist recommended "continued use of the PROMPT method" if "this method continue[d] to be of value to improving [the student's] speech acquisition" (id. at p. 10). The neuropsychologist did not recommend any specific speech-language therapy in his 2018 or 2020 reevaluations and in fact, in his April 2020 reevaluation solely recommended the continuation of the student's participation in speech-language therapy at least once a week (see Parent Ex. C; see Dist. Ex. 20 at p. 7).

Accordingly, the private neuropsychologist acknowledged that the student benefited from ABA and PROMPT, and recommended the use of principles of these methodologies particularly if they continued to prove useful for the student, but did not go so far as to make a specific recommendation for one type of methodology for the student or opine that any specific methodology was necessary with respect to the student's educational progress.

In addition, the student's private BCBA, who provided the student with direct ABA instruction, testified that ABA was the "only research-based teaching method" "that is proven . . . to help students learn skills and make progress" (Tr. pp. 1788-89, 1871, 1873-74; see Parent Exs. P, T, CC). This impression by the BCBA was presented in general terms as related to the methodology as a whole, however, and she did not make a similar claim specific to the student's needs.

During the impartial hearing, district staff offered testimony about their conversations outside of CSE meetings with the parents regarding their preferences with respect to the curriculum used to instruct the student as well as the methodologies of instruction (see Tr. pp. 94-95, 100-01).

The student's mother testified that the FIT representative discussed ABA at the May 2020 CSE meeting but that the rest of the committee members did not contribute to the discussion (Tr. pp. 1969-70). According to the mother, the CSE chairperson stated that ABA was a methodology and that methodologies generally were not recommended on an IEP (Tr. p. 1970).

The CSE chairperson testified that if the district talked about ABA at the May 2020 CSE meeting that it would have discussed "how it's not a methodology we can dictate on an IEP" (Tr. p. 552). She confirmed that the use of PROMPT had been discussed at many CSE meetings and that the district would use pieces of PROMPT as appropriate (Tr. p. 553). She denied that the CSE's inability to dictate methodology was a matter of policy but confirmed that if the team decided a student like the student in this case needed ABA she would not put that recommendation on the IEP (Tr. p. 555). She explained, "The only place I would include PROMPT or ABA would be in the present levels of performance, something along the lines of that they respond to PROMPT or they have been utilizing PROMPT or through PROMPT or via PROMPT or during ABA, discreet trial instruction, but it would not be a direct program recommendation" (Tr. pp. 554-55).

The director of pupil personnel services confirmed that the district 8:1+2 special classes used components of ABA and incorporated "ABA methodologies into their instructional practices" but did not use a strict ABA program (Tr. pp. 151-54; see Tr. p. 469). She further testified that the speech-language pathologist used "components of PROMPT" therapy "but it [was] not the only evidence based means to address a student who has motor planning issues" (Tr. pp. 162-63; see Tr. p. 553). The district's speech-language pathologist testified that PROMPT was not required for the student, but she did incorporate PROMPT into the student's therapy sessions (Tr. pp. 928-29, 931, 995-97).²⁶ The district's speech-language pathologist also testified that methodology is not placed on an IEP, but she incorporated PROMPT therapy into the therapy services for the student as it was a "good tool" (Tr. pp. 928, 931, 983, 994, 1029, 1033). The student's vocational special education teacher testified that components of the Digitability program employed ABA principles such as scaffolding, video modeling, multimodal instruction, and a structured setting (Tr. pp. 1530, 1583-84).

The hearing record demonstrates that although elements of the ABA and PROMPT methodologies had proven beneficial for the student, and the district indeed utilized such elements as part of the instruction provided to her while she attended the district program, there was no clear evaluative consensus that the student required ABA or PROMPT therapy in order to receive educational benefit. While the IHO's concern about whether the district approached the question of recommending a methodology on the IEP with the requisite open mind is not without basis, particularly given the testimony from the CSE chairperson that seemed to suggest that methodologies could not be recommended by the CSE, the parent's original claim was limited to whether the district had failed to recommend a methodology on the IEP that was necessary for the student to receive a FAPE. However, in this instance, because the evidence in the hearing record does not demonstrate that, as a substantive matter, the student required a particular methodology

²⁶ The speech-language pathologist testified that she provided articulation therapy, verbal modelling, auditory discrimination, and some methodology pieces of PROMPT and clarified that there was not an advantage of one method over the other but that the advantage is having the skill set to know what to pull when as each individual student responds to a methodology or a different plan is what helps a student not a box methodology (Tr. pp. 933-32).

in order to receive educational benefit based on a clear consensus gleaned from the evaluative information before the CSE when they recommended the student's program for the 2020-21 year, any discussion of predetermination would perhaps warrant expanding the parent's claim from that initially pleaded in the due process complaint notice and, in any event, would be largely academic given that the program recommended by the CSE for the 2020-21 school year was substantively appropriate. Accordingly, the IHO's finding that the lack of a specified methodology on the student's IEPs for the 2020-21 school year constituted predetermination of the student's program by the CSE and denied her a FAPE was in error.

5. Transition Planning and Postsecondary Goals

The IHO found that the transitional planning for the student included in the IEP denied her a FAPE because although the district presented the May 2020 vocational programming as being "directed toward building skill around individual interests with a goal of sustainable employment," the programming was not designed and aligned to these stated objectives (IHO Decision at p. 16). The IHO also determined that the transition plans on the IEPs were vague and failed to "set clear direction for a successful transition" and further found that the transition goal developed for the student was vague (*id.*).

The district contends that the IHO erred in finding that the district substantively violated the student's right to a FAPE by denying the student sufficient transition planning (Req. for Rev. ¶ 12). The district further asserts that the IHO's determination that the transition program was vague and not designed to provide the student with the skills to successfully transition into society beyond her high school years was not supported by the hearing record (*id.* ¶ 14).

Under the IDEA, to the extent appropriate for each individual student, an IEP must focus on providing instruction and experiences that enable the student to prepare for later post-school activities, including postsecondary education, employment, and independent living (20 U.S.C. § 1401[34]; *see* Educ. Law § 4401[9]; 34 CFR 300.43; 8 NYCRR 200.1[fff]). Accordingly, pursuant to federal law and State regulations, an IEP for a student who is at least 16 years of age (15 under State regulations), or younger if determined appropriate by the CSE, must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]).²⁷ An IEP must also include the transition services needed to assist the student in reaching those goals (20 U.S.C. § 1414[d][1][A][i][VIII]; 34 CFR 300.320[b]; 8 NYCRR 200.4[d][2][ix]). Transition services must be "based on the individual child's needs, taking into account the child's strengths, preferences, and interests" and must include "instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation" (20 U.S.C. § 1401[34][B]-[C]; 8 NYCRR 200.1[fff]).

In this case, at the time of the May 2020 CSE meeting and for the four years prior thereto, the student was placed in an out of district program that primarily focused on a program of 1:1

²⁷ In addition, State regulations require districts to conduct vocational assessments of students aged 12 to determine their "vocational skills, aptitudes and interests" (8 NYCRR 200.4[b][6][viii]).

instruction and the hearing record does not provide information regarding a transition plan during that time (Tr. p. 1694).

The district's assistant principal testified that, because the student was looking for a college experience that had academic requirements, an educational evaluation was conducted by the district's academic special education teacher as a "piece" of the assessment of the student's interests, preferences, and talents (Tr. pp. 737-38).²⁸ Since the college program under consideration by the student required a specified level of communication skills, a speech-language evaluation was completed and because the college program had requirements related to social reciprocity, independence, and problem solving, the district psychologist conducted a psychological evaluation in addition to the private April 2020 psychological reevaluation (*id.*). The assistant principal stated that all of the aforementioned skills and abilities were considered as part of the planning for the student's postsecondary goals in an effort to develop a comprehensive transition plan consistent with the postsecondary outcomes which were not solely work based in nature (Tr. pp. 738-39). Additionally, she testified that behavioral assessments were conducted all of which fed into the postsecondary planning for the student based on her specific goals (*id.*). The assistant principal testified that the May 2020 CSE discussed the student's postsecondary goals as they related to her postsecondary needs and the coordinated set of transition activities (Tr. p. 726). She indicated that the student's transition plan was based on the assessments and data the CSE had before it including two psychological evaluations, an educational evaluation, a speech-language evaluation, and observations, all of which were completed prior to the May 2020 CSE meeting, together with a parent questionnaire which fed into the goals that were determined at the May 2020 CSE meeting (Tr. pp. 616, 731, 758).^{29, 30}

The district's March 6, 2020 psychological evaluation included the results from the Adaptive Behavior Assessment System- Third Edition (ABAS-3), completed by the student's teacher, which assessed specific skills related to communication, community use, functional academics, school living, health and safety, leisure, self-care, self-direction, and social skills (Tr.

²⁸ The assistant principal testified that her focus had always been on transition as her "passion and . . . focus has always been to help students and families find their pathway towards a meaningful postsecondary life" (Tr. pp. 652-53). She stated she had attended "a lot" of training regarding transitions including training from BOCES regarding state indicators (*id.*).

²⁹ Although the parent questionnaire is termed transition assessment, the assistant principal testified that a transition assessment is a larger body of information than just a parent transition assessment questionnaire and that it includes behavioral assessment, aptitude tests, cognitive tests, observations, and is formal as well as informal (Tr. p. 732).

³⁰ The assistant principal testified that although the student did not attend the CSE meeting her voice was included in the assessments prior to the meeting as well as by the parents in their portion of the transition assessment (Tr. pp. 727-28). Further, she noted that the student's voice was considered in the psychological evaluation, the speech evaluations, and the educational evaluation as she was observed by the teacher and the speech-language pathologist at the student's placement where the evaluators interacted with the student, so the student's needs, preferences and interests were considered and included in the May 2020 IEP in its totality despite the student not being in the room for the meeting (Tr. pp. 729, 746).

pp. 349-50; Dist. Exs. 1 at p. 3; 22 at p. 6).³¹ The student's general adaptive composite score (GAC) based on her functioning in school was in the extremely low range and commensurate with her overall intellectual functioning (Dist. Ex. 22 at p. 6). The student's strongest performance was in the social domain where even though she received a score in the "low range," it was significantly higher than the scores she attained in the conceptual and practical domains, both of which were within the "extremely low range" (id.).

The April 2020 private psychological reevaluation included the parent's responses on the Behavior Assessment System for Children-Third Edition (BASC-3) and Vineland Adaptive Behavior Scales (Vineland) (Dist. Ex. 20 at p. 5). The parent's responses on the BASC-3 indicated that the student was friendly, helpful, and a student who had a genuine interest in others, but the scores also highlighted the parents' concerns with the student's impulsivity, self-regulation, and the adaptive skills of functional communication, activities of daily living, and leadership (id.). The parents also expressed concerns with the student's ability to maintain personal safety and her limitation in developing meaningful relationships (id.). On the Vineland, the parent's responses indicated that the student's adaptive behavior composite was in the low range, with her communication and daily living skills rated in the low range and her socialization skills judged to be a relative strength (id.). The April 2020 private psychological reevaluation report indicated that taken together, reports from parents and providers, alongside observations during the current evaluation, indicated that the student was a sweet, engaging, and warm young woman with a good sense of humor, who struggled across adaptive skills areas and exhibited significant challenges with attention, self-regulation, and functional communication, in turn affecting the quality of her interpersonal relationships despite her clear social interest (id.). The report also noted that the student did not yet have the requisite skills to care for herself independently and required continued provision of supports and interventions to promote her adaptive skills in order to facilitate an increasing degree of independence and self-care (id.).

The April 2020 transition assessment completed by the parents was intended to begin the process of identifying the student's interest, feelings, social skills, activities of daily living/preferences/choices, and health, as well as the family's perspective for the student's postsecondary needs and aspirations (Tr. pp. 350, 615-16, 618; Dist. Ex. 14 at pp. 1-7). According to the parents, the student enjoyed swimming, dancing, hiking, music, clothes, shopping, spending time with friends/family, watching hair styling videos, working out at the gym, yoga, and going out to restaurants (Dist. Ex. 14 at p. 1). The April 2020 transition assessment indicated that the student had meaningful relationships with her teachers, had a close relationship with her family, participated in a community players group, had respite from a community program, and was known to be kind, happy and a good friend (id.).

The April 2020 transition assessment noted that the student required directions to be explicitly presented and reinforced but she took satisfaction from completing tasks, enjoyed videos and TV shows, playing games, Taylor Swift, country music, and she was known to be a people pleaser (Dist. Ex. 14 at p. 2). The student was reported to seek out help from her parents as needed and communicated with adults to make her thoughts, wants, and needs known (id. at p. 3). The

³¹ The community use, school living, health and safety, and self-care are grouped as independent living and daily living skills under the practical domain (Dist. Ex. 22 at p. 6).

transition assessment indicated that the student's communication was hindered by her struggles with speech intelligibility and sentence construction (using nonverbal communication to compensate) but that she enjoyed being with peers and participating in shared activities (*id.* at pp. 3-4).

With respect to activities of daily living, the April 2020 assessment reiterated the student's leisure activities and reported that the student ate independently (with evolving cutting skills), she was independent with dressing (except starting zippers), and managed her own bedtime/morning/bathing routines with minor supervision (Dist. Ex. 14 at p. 4). Notably, the student needed significant support and supervision for shopping, travel, money skills, and medications (*id.*). The transition assessment identified the student's preferred times for activities and her basic health status (*id.* at pp. 5-6). Lastly, the April 2020 transition assessment identified the family's aspirations for the student in the future including achieving functional levels of reading, math skills, and communication abilities as the gateway to her participation in an adaptive college program, and to become more independent, leading to meaningful employment (*id.* at p. 7).³² The family expressed that their greatest concerns for the student were related to her safety, loneliness, and isolation (*id.*). The parents also expressed their shorter-term goals—within the next year—for the student as needing to continue her academic learning as well as building activities of daily living skills (*id.*).

Consistent with this evaluative information, the May 2020 IEP present levels of performance noted the student's needs to improve her intelligibility and communication skills and identified her academic needs including increasing her reading ability, mathematic skills, and in particular her money skills, as well as her need to develop pre-vocational skills (Dist. Ex. 1 at p. 6). The present levels of performance also noted the student's interests in playing and conversing with peers, her participation in workout/dance activities, theater class, cheerleading, spirit group, music, watching videos related to hairstyling, and yoga (*id.* at p. 7). The IEP also included the student's preferred topics such as dogs, weddings, and college as motivating interests and that she responded well to positive verbal praise (*id.*).

As for a functional vocational assessment, the CSE chairperson testified that such an evaluation would examine a student's ability to function and perform the specific job related tasks and employability skills within that setting and typically was not done until a student was out in the community when they would be involved in particular jobs, typically a year or two before they graduate (Tr. pp. 587-88). Although the parents' transition expert testified that the student needed a functional vocational assessment that "include[d] observation of a student in a natural setting doing particular vocational tasks in order to measure stamina, ability, cognitive sense, organizational skills, executive functioning skills," the student was not engaged in any vocational

³² An ABA assessment and treatment plan dated October 2020, August 2021, and March 2022, and the BCBA working with the student stated that the goal for the student was "to attend a college program designed for students with intellectual disabilities" and that the student would be discharged from ABA services once that goal was achieved (Parent Exs. P at p. 9; T at p. 16; CC at p. 17). On the other hand, the parents' transition expert testified that she was unsure if the student could "articulate" that she wanted to go to college and a goal of college may not "[align] with the [student's] preferences, interests, abilities, aptitudes" (Tr. p. 1737).

tasks as she was working on fundamental skills and prevocational skills (Tr. pp. 588-89, 1740-41, 1864).

Further, the assistant principal testified that, as the student was just beginning the transition process at high school, higher level transition assessments would be done further along in the process to define her work readiness and skill base more specifically versus basic interests, skills, and abilities (Tr. p. 750-51). She stated that the functional vocational assessments were done for older students "when [they were] preparing to really delve into the very specific idiosyncrasies of their strengths, their weaknesses, what their skills and ability are in connection to postsecondary planning" noting that the functional vocational assessment was very specific and not appropriate for students in the beginning of their high school career (Tr. p. 672). She also testified that the assessment questionnaire done prior to the May 2020 CSE meeting was not a functional vocational assessment so it is not listed in the transition portion of the IEP which she had been advised was for the specific upper-level assessments (Tr. pp. 672-73).

The assistant principal testified that the May 2020 CSE identified the student's transition needs and discussed postsecondary goals as well as the coordinated set of transition activities (Tr. p. 726). In consideration of the information summarized above, the May 2020 CSE developed postsecondary goals which indicated that upon graduation the student would participate in a postsecondary college experience, be functionally employed, and to live as independently as possible (Dist. Ex. 1 at p. 9).³³ Identified transition needs included improving self-advocacy skills, functional communication skills, soft skills of employment, functional academic skills, and engagement in non-preferred tasks (*id.*). The CSE recommended the student focus on coursework relating to academic and functional skills as referenced in the New York State learning standards for independent living skills, community skills training, social skills training, and employment skills training (*id.*).

The May 2020 IEP outlined the services and activities needed to facilitate the student's progression to postschool activities including participation in instruction aligned with the IEP goals, which would lead to the Skills and Achievement Commencement Credential (Dist. Ex. 1 at p. 17). For related services, the IEP indicated that the student would receive speech-language therapy to address her language needs, pragmatic skills, and speech articulation, and OT to address necessary fine motor skills (*id.*; *see* Tr. p. 759). With respect to activities in support of the community experience the IEP indicated that the student would explore participation in extra-curricular activities and clubs (Dist. Ex. 1 at p. 18). Activities to support the development of employment and adult living objectives included participation in interest inventories to explore potential areas of future employment and pre-vocational experiences and instruction (*id.*). Regarding the acquisition of daily living skills, the IEP indicated that the student would participate in instruction involving functional daily living skills and communication (*id.*). According to the May 2020 IEP the student did not need a functional vocational assessment at that time (*id.*).

³³ The May 2020 IEP transition goals indicated that in support of the student's goal to be functionally employed, services from the Office of People with Developmental Disabilities should be explored as well as support services for independent living including community and home living (Dist. Ex. 1 at p. 9).

Several annual goals included in the IEP also related to the student's transition needs, such as annual goals to improve her reading ability (sight words, decoding skills, comprehension), mathematics skills (money skills, calculator use, number identification), communication development (expanded sentence length, articulation, vocabulary, formulating questions for self-advocacy, and conversation skills), and motor skills to support writing (Tr. pp. 1011-19; Dist. Ex. 1 at pp. 9-13, 15). The annual goals also supported the student's social skills in the digital world (email goal), independent living (following a recipe), and vocational skills (task completion and seeking help as needed) (Dist. Ex. 1 at pp. 13-14). By way of example, the assistant principal testified that the student's goal for task completion was relevant with respect to the soft skills of employment, functional communication skills, and, depending on the task, could be addressing engagement in a non-preferred tasks, so it could support several of the transition goals and needs (Tr. pp. 618-19). The assistant principal noted that the daily living course recommended in the IEP was intended to target the cooking piece to work on utensil use, tools used in the kitchen to support independence, and that a prevocational class was included to focus on skills and interests, communication, direction following, task completion, and self-advocacy, which the principal opined were all of the pieces that would be needed for a postsecondary college experience as well as in general for postsecondary success throughout the day (Tr. pp. 759-60; Dist. Ex. 1 at pp. 12-15, 17). The May 2020 IEP also provided for a 1:1 aide to support the student's participation in extracurricular activities, which in turn would support the student's participation in community experiences (Dist. Ex. 1 at pp. 14, 17). The assistant principal testified that the academic piece was the functional academics of reading, writing and mathematics which was incorporated to help her towards the postsecondary goals, and it was all synthesized at the May 2020 CSE meeting (Tr. p. 760).

When the CSE convened on September 15, 2020, the postsecondary goals and the coordinated set of transition activities remained the same as no new information was presented, and, at that time, the student had yet to start the district program (Tr. p. 387; compare Dist. Ex. 1 at pp. 9, 17-18, with Dist. Ex. 2 at pp. 8-9, 17-18). The CSE chairperson testified that the committee agreed with maintaining the transition goals and coordinated set of transitional activities as stated on the May 2020 IEP (Tr. p. 592).

On October 15, 2020, when the student had been in school for approximately 2 weeks, the student's 1:1 vocational teacher conducted the Becker Reading-Free Vocational Interest Inventory, which the district special education teacher for vocational skills testified was a reading free interest inventory used to measure a student's interest in different categories typically used for postsecondary planning, explaining that "it [wa]s a transition document" (Tr. pp. 1591, 1596-97; see Dist. Ex. 46).

The CSE convened again on December 4, 2020, and this IEP reflected a continuation of the postsecondary goals and coordinated set of transition activities (Tr. pp. 811-12; Dist. Ex. 3 at pp. 8-9, 19-20). The December 2020 CSE chairperson testified that to see the student's plan for reaching her postsecondary goals it would be contained in the entire IEP, the present levels of performance, the needs, the parent concerns, the annual goals, the transition needs, and the coordinated set of activities as well as the modifications that the student needed to get there (Tr. pp. 600-01). Further, she indicated that the transition plan supported the student by providing for participation in prevocational experiences, participating in vocational instruction as well as functional daily living skills and communication (Tr. p. 601).

The parents' transition expert testified that she reviewed the student's IEPs but did not conduct an interview or assessment of the student (Tr. pp. 1715-16, 1767). She opined that all of the district's IEPs were "noncompliant based on the federal mandates in Indicator 13" (Tr. pp. 1720, 1726, 1730; see Parent Ex. AA). The parents transition expert testified that Indicator 13 was a set of eight questions that should be applied to each IEP (Tr. p. 1721). She further testified that "it is a guideline and a checklist for school districts to use to audit their IEPs to make sure they are in compliance with the federal law and IDEA" (Tr. p. 1724). Furthermore, she testified that the Indicator 13 was the "national suggested checklist that every state should use," but she was unaware what the New York State Indicator 13 checklist consisted of and she did not review the student's IEPs with the New York State Indicator 13 (Tr. pp. 1772-74; see Parent Ex. AA).

The transition expert testified that none of the documents she reviewed contained information pertaining to the student's interests (Tr. p. 1755). However, contrary to the expert's view, as described above, the district had conducted a transition assessment dated April 8, 2020 completed by the parents detailing the student's interests including going to college (Dist. Ex. 14 at pp. 1-7). The student's vocational special education teacher also conducted a Becker assessment with the student demonstrating the student's interests (see Dist. Ex. 46).

The foregoing discussion regarding the recommended transition plan for the 2020-21 school year demonstrates that the May, September, and December 2020 IEPs focused on providing the student with instruction and experiences that enabled the student to prepare for postsecondary activities including postsecondary education, employment, and independent living. The relevant CSEs considered various sources of information including formal assessments, observations, and interactions with the student which considered the student's strengths, preferences and interests which enabled the CSE to identify postsecondary goals and activities to support those goals. An independent review of the IEPs in totality demonstrates the IEPs provided for instruction, related services, community experiences, daily living skills, and the student's postsecondary independent living needs. The IEPs set forth goals to address the student's postsecondary activities, identified the relevant needs to support the goals as well as the activities the student would engage in to proceed along her journey to postschool activities. Although the student was not present at the May, September, or December 2020 CSE meetings, the hearing reflects that the committees had a significant amount of information regarding the student's strengths, preferences, and interests to develop an appropriate transition plan (see 8 NYCRR 200.4[d][4][i][c]; "Transition Planning and Services for Students with Disabilities," at p. 4 [noting that students should "actively participate in planning their educational programs leading toward achievement of postsecondary goals" but indicating that, if "a student does not attend, the school district must take steps to ensure the student's preferences and interests are considered"]).

Additionally, while the IHO agreed with the parents that the district's use of "Digitability" as part of the student's transitional programming was not aligned with her goals, beyond her abilities, and unrelated to certain functional skills the student should have been developing because it focused in part on teaching the student to write emails independently (IHO Decision at p. 16), at the May 2020 CSE meeting the parents stated that they were helping the student to email and text (Dist. Ex. 1 at p. 7). The student was also working on cell phone skills and emailing at Fit Learning (id. at p. 6). The student's vocational special education teacher testified that the Digitability curriculum was "a web-based work-ready training program which teaches digital literacy" (Tr. pp. 1498, 1524). She testified that Digitability matched the student's postsecondary goal to attend

college "because it's digital literacy and New York State has standards on digital literacy and it is necessary for all learners, including [the student's] learning profile" (Tr. p. 1522). The vocational special education teacher testified that the curriculum taught the student to "safely navigate digital literacy" (Tr. pp. 1522, 1529).

Although the transition plan in place for the 2020-21 school year may not have been as robust as the parent would have liked, the IEPs as a whole reflect the CSE's consideration of a variety of evaluative materials which sufficiently identified the student's goals, interests, strengths and weaknesses with respect to her transition from secondary school to postsecondary plans and the resultant programming appropriately addressed the student's transition needs while also reflecting that the student was just beginning to embark on the transitional planning phase of her education. Accordingly, the IHO's determination that the CSE failed to recommend appropriate transition planning for the student and denied her a FAPE on this basis must be reversed.

C. 2021-22 School Year

The IHO failed to make any procedural or substantive findings with respect to the June 8, 2021 or June 30, 2021 IEPs; however, he nonetheless concluded that the district failed to offer the student a FAPE for the 2021-22 school year (see IHO Decision at pp. 10-23).

The district argues that the IHO "failed to directly address any deficits for the [2021-22] school year, despite finding an expressed denial of FAPE for that school year and awarding significant reimbursement for that school year" (Req. for Rev. ¶ 30). In the answer, the parents contend that "numerous" IHO findings pertaining to "procedural violations and insufficient services" applied to both the 2020-21 and 2021-22 school years (Answer at p. 9). The parents argue that the IHO's findings pertaining to predetermination and parental participation applied to the 2021-22 school year (id.). Additionally, the parents argue that the IHO's findings on transition programming and vagueness of the transition goal was applicable to the 2021-22 school year (id.). Additionally, the IHO mentioned briefly in one sentence that the transition plans "on the four IEPs at issue are vague" which presumably refers to the June 8, 2021 IEP (IHO Decision at p. 16). Furthermore, the parents had the opportunity but did not cross-appeal the IHO's lack of findings with respect to the 2021-22 school year (see generally Answer). Upon my independent review of the hearing record, and consistent with my findings above, I am unable to sustain the IHO's finding that the district denied the student a FAPE for the 2021-22 school year.

The CSE convened on June 8, 2021 for an annual review and to recommend a program for the student for the 2021-22 school year (Dist. Ex. 4 at p. 1). The June 8, 2021 CSE considered updated evaluative information including June 2021 updates in the areas of reading, math, and cognitive, motor, language/communication and activities of daily living from the student's home instruction providers (Dist. Ex. 8 at p. 2). The committee reviewed two private speech and language evaluations from April and May 2021 as well as an April 2021 private PT evaluation (id.). The March 2021 private ABA progress summary and the April 2021 home school third quarter individualized home instruction plan (IHIP) report were considered by the June 8, 2021 CSE, as was the district's January 2021 IEP progress report (id.). The June 8, 2021 CSE also considered the student's previous IEP and evaluative information including the December 4, 2020 IEP and district evaluative information including the March 2018 and February 2020 speech-language evaluations, the February 2020 educational evaluation, and the March 2020

psychological evaluation, as well as the April 2020 private psychological reevaluation (id. at p. 1). The June 8, 2021 CSE reviewed that the student was receiving home instruction since January 25, 2021 and reportedly received ABA therapy 20 hours per week, four 40-minute sessions per week of PROMPT therapy, and two 60-minute sessions per week of PT (Dist. Ex. 4 at p. 1).

The June 8, 2021 IEP reiterated that based on an April 2020 private psychological reevaluation the student's nonverbal and verbal cognitive abilities, as well as her adaptive skills were all in the extremely low range (compare Dist. Ex. 4 at p. 6, with Dist. Exs. 2 at pp. 5-6; 3 at pp. 5-6). As reported in the IEP, the April 2020 psychological reevaluation indicated that the student's reading skills were at a mid-kindergarten level and the student exhibited ongoing challenges with attention, self-regulation, and functional communication that limited the depth of interpersonal relationships, despite the student's strong social interest (Dist. Ex. 4 at p. 6).

The June 8, 2021 IEP provided updated evaluative information from a private ABA assessment conducted via interview with the parent in March 2021 indicating that the student's general development scores according to the Developmental Profile-4 (DP-4) fell in the .1 percentile compared to children in the same age range as the student and was consistent with the private ABA assessment in October 2020 using the Developmental Profile-3 (DP-3) with a score of .1 percentile (Dist. Ex. 4 at pp. 6-7).³⁴

According to the June 8, 2021 IEP, the student's private provider reported that the focus of ABA sessions was on skill acquisition rather than behavior reduction as the student did not engage in disruptive, aggressive, or self-injurious behavior (Dist. Ex. 4 at p. 7). The private provider indicated that the student's "biggest maladaptive behavior [wa]s reported to be non-responsiveness" noting that this was primarily from processing difficulties, lack of skills, and "anxiety over responding due to lack of confidence, as opposed to non-compliance" (id.).

The June 8, 2021 IEP included updated speech-language testing by the student's private provider with evaluation findings that indicated the student was significantly delayed in receptive and expressive language skills (Dist. Ex. 4 at p. 7). The IEP included a private oral motor/feeding/speech evaluation conducted in May 2021 that reported the student presented with a significant oral-motor delay, dysarthria in the oral-motor muscles, and reduced tongue strength and mobility impeding the student's articulatory efforts (id.). Additionally, the student presented with a tongue thrust/reverse swallow pattern (id.). Testing that included a portion of the Goldman Fristoe Test of Articulation (GFTA) reported that the student's speech contained substitutions and distortions with intelligibility of speech judged to be poor (id.).

The June 8, 2021 CSE considered the reading update provided by the parents dated June 2021 that indicated the student was "able to recite the letters of the alphabet, identify the initial consonant of a word presented orally, blend sounds to make a word presented verbally, and identify words that rhyme when presented orally" (Dist. Ex. 4 at p. 7). The IEP indicated that the student was able to read 60 CVC words and recognized Dolch words from the second grade list (id.). The

³⁴ The same private provider had also completed the October 2020 assessment that was conducted with the parent during an interview, with several items tested via telehealth with the student on October 5, 2020 to confirm acquisition (Dist. Ex. 4 at pp. 6-7).

IEP reported that the student had a limited fund of sight words and in the area of decoding, the student struggled to match rhyming words when presented with word cards, in addition to difficulty identifying blends in a short vowel word (id.). The IEP reported that the student, when presented with text at her reading level, had difficulty sequencing events of stories she had read and answering comprehension questions (id.). According to the June 8, 2021 IEP, the parents provided a June 2021 writing update that indicated the student was able to spell her first and last name (id.). The IEP reported that the student had difficulty determining the sound-letter relationship in order to spell out words (id.).

The June 8, 2021 IEP provided information from the June 2021 math update from the student's parents indicating that the student was able to rote count to 30, name numerals one to 100, identify concepts all, none, and some, gather a set of requested items, identify coins by name and value, and identify four three dimensional shapes (Dist. Ex. 4 at p. 7). According to the IEP, areas of difficulty included the student maintaining one to one correspondence when counting a set of objects, combining manipulatives to add numbers within ten, and identifying the next number in a sequence to ten (id.).

In the area of social development, the June 8, 2021 IEP reported information from the student's time in the district program as the private providers did not provide updates on the student's social development. The June 8, 2021 IEP included previous social development information related to the student's comfort within the classroom setting, appropriate engagement with peers, her social awareness, age-appropriate interests in things such as fashion and music, and her enthusiastic participation in high school extra-curricular activities (Dist. Ex. 4 at p. 8). In the area of physical development, the June 8, 2021 IEP reported updated information from an April 2021 private PT evaluation (id.). The April 2021 PT evaluation indicated the student had significant weakness in her core and extremities which limited her functional mobility in areas including activities of daily living, transitions, getting up from the floor, stair navigation and squatting (id.). The IEP reported that, physically, the student presented with poor endurance, significant difficulty with balance, coordination, and motor planning which limited the student's performance of tasks independently (id.). As the June 2021 CSE did not have an OT update, information was reported on the student's previous March 2018 OT evaluation indicating the student's fine motor needs in writing letters, words and numbers, coloring and completing fine motor activities in a timely manner (compare Dist. Ex. 4 at p. 9, with Dist. Ex. 3 at p. 7).

The June 2021 IEP described the student's academic needs to match rhyming words, identify blends in a short vowel, increase fund of sight words, sequence the events of a story, and answer comprehension questions about text (Dist. Ex. 4 at p. 8). Further, the student needed to improve spelling CVC words, one to one correspondence, adding numerals within 10, identifying the next number in a sequence, improve her ability to communicate needs, decrease time it takes to initiate vocational tasks and improve the ability to follow a checklist (id.). Additionally, the student needed to continue to improve her receptive and expressive language skills, to ask questions, answer questions and use core vocabulary, as well as improve her oral motor skills and speech intelligibility (id.).

The June 2021 IEP indicated the student required a program with a small teacher-to-student ratio with minimal distractions in order to academically progress (Dist. Ex. 4 at p. 9). Strategies for addressing the student's management needs included providing positive behavioral supports

throughout the day, providing repetition and modeling, verbal/nonverbal cues, scaffolding of directions, refocusing, redirection, and using visual aids (id.). Additional strategies included providing wait time to process verbal directions and prior to additional verbal prompts being given, as well as providing verbal demands and directions that were clear and concise (id.). The June 2021 IEP stated that the student had deficits in the areas of cognitive ability, academic skills, language, and communication, as well as fine and gross motor skills that affected her ability to be involved in and make progress in the general education curriculum (id.). As related to the student's above needs, the June 8, 2021 CSE identified 36 annual goals with corresponding benchmarks for the 2021-22 school year in the areas of reading, writing, mathematics, speech and language, social development, motor skills, daily living skills, and career/vocational/transition (id. at pp. 11-17).³⁵

The committee considered the student's present levels, and areas of need and ultimately recommended an 8:1+2 special class with related service recommendations consisting of 42-minute speech sessions 40 times quarterly, one 42-minute session per week of individual OT, one 42-minute session per week of individual PT and adapted physical education every other day (Dist. Ex. 4 at pp. 18-19). A 1:1 aide was recommended for hallway transitions, and extracurricular activities and a group aide (5:1) was recommended for lunch, electives, and adapted physical education (id.). The CSE also recommended 40 hours a year for behavioral consultation as well as one 40-minute web-based team meeting with the parents per month (id. at p. 19). The coordinated set of transition activities, as previously discussed in great detail, remained the same in the June 2021 IEP as the December 2020 IEP (compare Dist. Ex. 4 at pp. 20-21 with Dist. Ex. 3 at pp. 19-20). Additionally, services were to be provided for the summer session as indicated on the student's 2021-22 IEP (Dist. Ex. 4 at p. 20).

The June 8, 2021 CSE recommended an 8:1+2 special class and "within that [8:1+2] setting she could receive individualized/individual, whichever way you want to put it, instruction in areas of ELA, math and vocational as needed" (Tr. p. 134). The June 8, 2021 IEP did not include separate 1:1 instruction because, according to the testimony of the district director, the CSE developed "goals based upon identified needs and according to those goals we felt that [the student's] goals could be achieved, and her needs could be met within the [8:1+2] setting" (Tr. pp. 134-35). The district director testified that there were opportunities for individual instruction in the 8:1+2 special class because there was a teaching assistant and an aide along with the special education teacher and based upon the needs of the student the special education teacher could provide individual instruction (Tr. pp. 135-36). The June 8, 2021 annual goals were developed based upon what the district observed when the student was in the district as well as the reports from the student's home providers "based upon her current level of functioning and her identified needs" (Tr. pp. 137-38; see Tr. pp. 545-46, 550; see Tr. p. 1186). The district director testified that when you look at the individual student goals the teacher may determine that the student needed 1:1 instruction or within a dyad and carrying out the goals from an individual "setting into other settings and into other activities across the curriculum" (Tr. pp. 139-40). Ultimately, the

³⁵ In the request for review, the school district asserts that the student's IEP goals aligned with the student's present level of performance (Req. for Rev. ¶ 10). During the student's time within the district, the academic special education teacher, vocational special education teacher, and district speech-language pathologist testified regarding the student's present levels, goals, collection of data, and addressing the student's need areas, as well as formal documentation of progress within the student's January 2021 quarterly report (Tr. pp. 895-99, 922-23, 925-27, 1137-38, 1149, 1163-75, 1485-90; see Dist. Ex. 9).

June 8, 2021 CSE determined that the student's goals could be met within the 8:1+2 special class (Tr. p. 140).

Additionally, the CSE chairperson testified that the June 8, 2021 CSE reviewed a cognitive, motor, language/communication and activities of daily living update from January 2021 through May 2021 (Tr. pp. 438-39; see Dist. Ex. 28). During this period of time, the student was receiving 1:1 ABA instruction (Tr. p. 439). The CSE chairperson testified that a student "working on goals one-to-one in isolation doesn't allow for practice and generalization so certainly one-to-one ABA instruction would be quite different than being able to work in a classroom in a small group or a whole group lesson" (Tr. p. 440). The 1:1 ABA instructional program lacked the opportunities for socialization with the student's peers that she had in the district's program (Tr. p. 441). The CSE chairperson testified that the recommendation for the 8:1+2 special class was designed for the student's goals to be met either as 1:1 instruction, small group, or whole group (Tr. pp. 452-54). Even without specifying 1:1 instruction on the June 8, 2021 IEP, the CSE chairperson testified that the 1:1 instruction was still provided for a "majority" of the day (Tr. pp. 452, 456). It was further discussed at the June 8, 2021 CSE meeting that the student performed better in the classroom and did not like to be pulled away from her peers and her performance was better in the classroom as opposed to 1:1 isolation outside the classroom (Tr. pp. 630-31). Again, the parents disagreed with the 1:1 instruction in the 8:1+2 special class (Tr. pp. 458, 544).

While the parents wanted 1:1 instruction for the student the CSE felt that "her goals and needs could be met within an [8:1+2]" as individual instruction "was too highly restricted for the student" (Tr. p. 145). The CSE chairperson testified that at the June 30, 2021 CSE meeting it was again discussed that the program recommendation "was not a significant change" as the student would continue 1:1 instruction or "individualized instruction" or small group that was "embedded" in her 8:1+2 throughout the day (Tr. pp. 468-69).³⁶

Here, the recommendations contained in the June 8, 2021 IEP, including an 8:1+2 special class with 1:1 instruction within the classroom, the student's transition plan and postsecondary goals, were reasonably calculated to enable the student to make educational progress taking into account the student's needs as reflected in the unchallenged present levels of performance contained therein. Absent specific findings by the IHO of deficiencies in the district's CSE process or programming with respect to the 2021-22 school year, I find that to the extent any claims pertaining to the 2020-21 school year which were addressed by the IHO in his decision, and also were also addressed above in my discussion of the issues on appeal for the 2020-21 school year, the analysis and findings included therein apply with equal force to the 2021-22 school year. Accordingly, the IHO's finding that the district deprived the student of a FAPE for the 2021-22 school year must be reversed.³⁷

³⁶ The June 30, 2021 CSE meeting was a requested review and as a result of the meeting no changes were made to the June 8, 2021 IEP (see generally Dist. Ex. 45).

³⁷ An additional finding made by the IHO, and challenged by the district on appeal, which may be construed as applying to both the 2020-21 and 2021-22 school years and is interwoven with several of his other findings is that procedural violations and implementation failures by the district impeded the parent's ability to participate in the CSE process. However, as I have reversed the IHO's decision in its entirety, there is no need to consider whether

VII. Conclusion

Having found that the evidence in the hearing record supports a finding that the district offered the student a FAPE for both the 2020-21 and 2021-22 school years, the IHO's findings to the contrary must be reversed, and the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 14, 2022, is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years and that ordered the district to fund the home instruction costs for the period of July 1, 2020 through June 30, 2022 and ordered the district to conduct a functional vocational evaluation.

Dated: **Albany, New York**
 March 10, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER

any of the violations the IHO determined had occurred individually or cumulatively prevented the parents from participating. The IHO also did not find that any stand-alone parental participation claim was valid and denied the student a FAPE and, indeed, the hearing record is replete with evidence that the parents participated actively in the CSE process, voiced concerns which were acknowledged by the CSE and otherwise regularly communicated with the district about the student's education. Accordingly, to the extent the IHO found that the parent's ability to participate in the CSE process was impeded, that finding too must be reversed.