



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-070

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

### **Appearances:**

Cuddy Law Firm, PC, attorneys for petitioner, Jason H. Sterne, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational services respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2014-15 school year were appropriate. The district cross-appeals from that portion of the IHO's decision which determined that the educational program recommended by the CSE for the student for the 2014-15 school year was not appropriate. The appeal must be dismissed. The cross-appeal must be sustained in part.

### **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 hearing record reflects the student attended a general education preschool class in a district public school that consisted of one teacher, one paraprofessional, and 18 students during the 2013-14 school year (Tr. pp. 399-401). On September 19, 2013, the parent referred the student for an initial special education evaluation due to her concerns regarding the student's development and speech-language skills (Parent Ex. BB). On February 12, 2014, a Committee on Preschool Special Education (CPSE) convened to conduct the student's initial review and to develop an IEP

for the remainder of the 2013-14 school year and summer 2014 (Dist. Ex. 10). Finding the student eligible for special education programs and services as a preschool student with a disability, the February 2014 CPSE recommended the student receive 20 hours per week of special education itinerant teacher (SEIT) services together with three 30-minute sessions per week of individual occupational therapy (OT) (*id.* at pp. 1, 4, 16).<sup>1</sup> The hearing record reflects the student continued to attend the district general education preschool class with the support of a SEIT (Tr. pp. 399-401, 422-25).<sup>2</sup>

On May 21, 2014, a CSE convened to conduct the student's "[t]urning [f]ive" review and to develop an IEP for the 2014-15 school year (Tr. p. 30; Parent Ex. C). Finding the student eligible for special education as a student with a speech or language impairment, the May 2014 CSE recommended that the student receive ICT services in a general education classroom for instruction in math, English language arts (ELA), social studies, and science (Parent Ex. C at pp. 1, 4-5, 8).<sup>3</sup> The CSE also recommended related services including two 30-minute sessions per week of speech-language therapy in a group (3:1), one 30-minute session per week of individual OT, one 30-minute session per week of OT in a group (2:1), and two 30-minute sessions per week of physical therapy (PT) in a group (2:1) (*id.* at p. 5). In addition, the May 2014 CSE developed annual goals and recommended strategies to address the student's management needs (*id.* at pp. 1-4).

According to the hearing record, the student attended a district kindergarten general education class and received ICT and related services during the 2014-15 school year (Tr. pp. 125-27, 445).

#### **A. Due Process Complaint Notice**

In a due process complaint notice, dated December 31, 2014, the parent, through her attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (*see* Parent Ex. A). First, with respect to the 2013-14 school year, the parent alleged that the February 2014 IEP failed to recommend adequate speech-language therapy and OT services (*id.* at p. 6). With regard to the 2014-15 school year, the parent alleged that the May 2014 IEP did not provide the student with appropriate goals or services (*id.* at pp. 5-9). Specifically, the parent contended that the May 2014 IEP was not based upon "new updated evaluative data" about the student's strengths and weaknesses (*id.* at pp. 6, 9). The parent further contended that the annual goals in the IEP were inappropriate because they were

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<sup>1</sup> State law defines special education itinerant services (commonly referred to as "SEIT" services) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; a hospital; a state facility; or a child care location as defined in [Educ. Law § 4410(8)]" (Educ. Law § 4410[1][k]; *see* "Special Education Itinerant Services for Preschool Children with Disabilities," Office of Special Educ. [Oct. 2015]"; "Approved Preschool Special Education Programs Providing Special Education Itinerant Teacher Services," Office of Special Educ. [June 2011], *available at* <http://www.p12.nysed.gov/specialed/publications/SEITjointmemo.pdf>).

<sup>2</sup> The hearing record shows the student did not receive the mandated OT services recommended by the February 2014 IEP (Tr. pp. 52, 87-88).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

vague and immeasurable, did not address all of the student's areas of need, there were no academic goals, and the goals did not provide adequate information to measure the student's progress, preventing the parent from meaningfully participating in the IEP development process (*id.* at pp. 4-5, 8-9). The parent also alleged that that the student required more intensive instruction and support than could be provided in a general education setting with ICT services, and therefore required a smaller class size (*id.* at pp. 6-7). The parent further alleged that the IEP contained insufficient recommendations for speech-language therapy, OT, and PT services (*id.* at pp. 6-8). The parent also alleged that the district failed to properly implement the May 2014 IEP by failing to provide the student with the recommended related services or the parent with reports of the student's progress toward her annual goals (*id.* at p. 8). For relief, the parent requested a psychoeducational evaluation, the district to reconvene the CSE and develop an IEP placing the student in a "smaller class" with a paraprofessional, access to specific records, and compensatory education in the form of academic tutoring, speech-language therapy, OT, and PT with providers of the parent's choosing (*id.* at pp. 9-14).<sup>4</sup>

## **B. Impartial Hearing Officer Decision**

The parties proceeded to an impartial hearing on February 26, 2015, which concluded on April 23, 2015, after three days of proceedings (*see* Tr. pp. 1-521). In a decision dated June 3, 2015, the IHO noted that the district conceded that it failed to provide the student a FAPE for the 2013-14 school year and held that the district failed to provide the student a FAPE during the 2014-15 school year (*see* IHO Decision at pp. 11-14). Specifically, with regard to the 2014-15 school year, the IHO held that the hearing record showed that the evaluative information in existence at the time of the May 2014 CSE meeting was not made available to, or reviewed by, every member of the CSE (*id.* at p. 12). The IHO also held that because not all members of the CSE were able to review the evaluative information and the student did not receive related services during the 2013-14 school year, the CSE had inadequate information to establish appropriate annual goals or to identify the required frequency of related services for the student (*id.*). However, the IHO determined that the recommendation for ICT services was appropriate and that the student was "provided with personalized instruction with sufficient support services to permit her to benefit educationally from that instruction" during the 2014-15 school year (*id.* at p. 13). Turning to the parent's requested remedies, the IHO found that the district's offer to provide additional services for its failure to provide a FAPE during the 2013-14 school year was appropriate (*id.* at pp. 11-12).<sup>5</sup> With regard to the parent's request for additional services to remedy the failure to provide a FAPE during the 2014-15 school year, the IHO found that because the student made adequate progress during the school year while receiving the services mandated by the May 2014 IEP, the hearing record did not support an award of additional services to remedy the denial of a FAPE (*id.* at pp. 12-13). Lastly, because the district consented to the parent's request for a psychoeducational evaluation, the IHO ordered the CSE to consider the results of the psychoeducational evaluation,

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<sup>4</sup> During the impartial hearing the district agreed to conduct the requested psychoeducational evaluation, and it was apparently completed prior to the close of the impartial hearing (Tr. pp. 14-15, 196-97, 511).

<sup>5</sup> Neither party appealed from the IHO's determinations relative to the 2013-14 school year and, accordingly, they have become final and binding on the parties (*see* 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; *see also* C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

to update and review assessments and evaluations, to develop an IEP for the 2015-16 school year, and determine if it would be appropriate to provide the student with additional services to compensate for the district's failure to provide a FAPE during the 2014-15 school year (*id.* at pp. 13-14).

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

The parent appeals, contending that the IHO erred in finding that the recommendation for ICT services did not deny the student a FAPE. The parent contends that the IHO erred in not ordering the student be placed in a smaller class. The parent also contends that the IHO erred in deferring the question of appropriate compensatory education services to remedy the denial of a FAPE for the 2014-15 school year to the CSE.

In an answer and cross-appeal, the district responds to the parent's petition by variously admitting and denying the allegations raised and asserting that the IHO correctly determined that the ICT services recommended in the May 2014 IEP were appropriate for the student. The district also asserts that an SRO should decline to address the parent's appeal because it was not properly pleaded and the parent's memorandum of law raised issues not raised in the petition.

In a cross-appeal, the district asserts that the IHO erred in determining that the district did not provide a FAPE to the student during the 2014-15 school year. The district argues that the CSE had sufficient information to develop a program for the student, and the hearing record shows that the program developed at the May 2014 CSE was appropriate for the student. The district contends that because a FAPE was provided to the student, compensatory education would not be necessary or appropriate, and the IHO properly did not award compensatory services in any event because the hearing record showed the student made progress while receiving the mandated services.

In an answer to the district's cross-appeal, the parent argues that the IHO correctly determined that not all members of the May 2014 CSE had the opportunity to review the existing evaluations and the CSE had inadequate information upon which to base annual goals or to establish that the recommended frequency of services and group sizes were appropriate to meet the student's needs. In a reply to the district's defense that the petition was not properly pleaded, the parent asserts that her petition properly identified the findings, conclusions and orders of the IHO to which exceptions were taken and that her memorandum of law contained a more detailed legal argument.

#### **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. 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. Florida 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]). 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., 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]).

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 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 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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]).

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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Scope of Review**

As a preliminary matter, the district contends that some of the parent's assertions regarding the substantive inadequacy of the recommendation for ICT services and the parent's specific requested relief may not be considered because they were not included in the petition but were raised only in a memorandum of law. A review of the parent's petition and the accompanying memorandum of law does not support the district's argument. It has long been held that a memorandum of law is not a substitute for a petition for review, which is expected to set forth the petitioner's allegations of the IHO's error with appropriate citation to the IHO's decision and the hearing record (8 NYCRR 279.8[a][3], [b]; see, e.g., Application of a Student with a Disability, Appeal No. 14-076; Application of a Student with a Disability, Appeal No. 12-113; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of a Child with a Disability, Appeal No. 07-112). To hold otherwise would permit parties to circumvent the page limitations set by State regulation (8 NYCRR 279.8[a][5]). State regulations direct that "[n]o pleading other than the petition or answer will be accepted or considered by a State Review Officer except a reply by the petitioner to the answer" (8 NYCRR 279.6; see 8 NYCRR 279.8 [setting forth form requirements for pleadings and memoranda of law]). Thus, any argument included solely within a memorandum of law has not been properly asserted. Specifically, the district asserts that the petition fails to include references to the parent's claims that the recommendation for ICT services was inappropriate in light of the student's needs, that several CSE members found the recommendation to be inappropriate, and that the CSE's decision not to recommend 1:1 services was not appropriate in light of the student's academic functioning. However, contrary to the district's assertions, the petition makes reference to each of these arguments in its recitation of pertinent facts (see Pet. ¶¶ 13, 16-20, 23-49, 57-59). Although the petition contains only bare-bones references to these arguments, the issues are sufficiently identified to allow the district, as well as this reviewer, to identify the parent's concerns with the IHO's decision. The memorandum of law more specifically fleshes out the details of the parent's claims, as is permitted by State regulations. I additionally note that the combined length of the parent's petition and memorandum of law are within the page limitation specified for a petition,

and I decline to dismiss the parent's claims on the basis that they were not properly pleaded in her petition.<sup>6</sup>

## **B. May 2014 IEP**

### **1. Sufficiency and Consideration of Evaluative Information**

I turn next to the dispute between the parties regarding the sufficiency and consideration of the evaluative information available to the May 2014 CSE.<sup>7</sup>

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

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide

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<sup>6</sup> It is not necessary to address the district's assertions regarding the other claims it contends were raised solely in the parent's memorandum of law in light of the other findings made herein.

<sup>7</sup> The parent alleges that the IHO made a "credibility determination" with respect to whether certain evaluations were reviewed at the May 2014 CSE meeting (Answer to Cross-Appeal ¶¶ 1-8). Generally, an SRO gives deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist., 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, however, the IHO's finding in question was not a credibility determination but, rather, a finding that not all members of the CSE were able to review the most recent evaluative information, and the parent's allegations more properly address the weight that should be afforded to the testimony of various witnesses (see IHO Decision at p. 12).

assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]). However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*8 [S.D.N.Y. Mar. 21, 2013]). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at \*9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*7-\*9 [S.D.N.Y. Oct. 12, 2011]).

The IHO indicated that the "team members did not all have the opportunity to review the evaluations that were completed earlier in the year" (IHO Decision at p. 12). The school psychologist testified that she did not recall whether copies of the evaluative reports were available at the May 2014 CSE meeting (Tr. pp. 32, 38-40, 50). However, the preschool teacher testified that the school psychologist referred to evaluative reports during the CSE meeting (Tr. p. 432).<sup>8</sup> Although copies of the evaluative reports may not have been available to all CSE participants at the May 2014 CSE, the hearing record reflects the May 2014 CSE developed the IEP based upon the evaluations as well as input and discussion of the CSE participants (Tr. pp. 52-53; 441-42, 454-55).<sup>9</sup> Furthermore, the district is not required to provide a parent with all evaluative information so long as the CSE does not predetermine its recommendations and the parent is able to participate (A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at \*10 n.7 [S.D.N.Y. July 30, 2015]).

The IHO indicated that the May 2014 CSE did not consider related service progress reports in the development of the May 2014 IEP (IHO Decision at p. 12). However, according to the school psychologist, the student did not receive related services prior to the May 2014 CSE meeting and, therefore, there could not have been any related service progress reports to review (see Tr. pp. 87-88). Notably, the May 2014 CSE developed the IEP from evaluations conducted within the current school year; specifically, November 2013 psychoeducational, speech-language, and OT evaluations, a February 2014 PT evaluation, and a May 2014 classroom observation (see Tr. p. 31; Parent Exs. C; E; F; G; J; L). The hearing record reflects that the May 2014 IEP contained information from the speech-language and PT evaluations (see Tr. pp. 40, 45-46; Parent Ex. C at pp. 1-10).<sup>10</sup> Further, the recent related service evaluations appeared to remain accurate at the time of the May 2014 CSE meeting in that while the student's language and motor skills had improved,

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<sup>8</sup> The parent was involved in obtaining all of the evaluations the IEP was based upon with the exception of the May 2014 classroom observation conducted by the district (see Tr. pp. 31, 449; Parent Exs. C; E; F; G; J; L).

<sup>9</sup> The school psychologist testified that the May 2014 CSE determined the student's related service needs including frequency of service based on discussion among CSE participants and the evaluative reports (see Tr. pp. 52-54; Parent Exs. C; E; F; G; J; L). Both the parent and the preschool teacher testified they provided their input during the CSE meeting, including their disagreement with the recommendation for ICT services (Tr. pp. 441-42, 454-55).

<sup>10</sup> The school psychologist testified that she specifically noted information from both the speech-language and PT evaluations in the May 2014 IEP (Tr. pp. 45-46).

they had not substantially changed between the time of the evaluations and the CSE meeting (see Tr. pp. 33-35, 100-03; Parent Exs. E; F; L).

The November 2013 psychoeducational evaluation provided both an overall description and detailed information regarding the student's cognitive skills, activities of daily living (ADL), and social/emotional functioning (see Parent Ex. G). Administration of the Wechsler Preschool Primary Scale of Intelligence-Fourth Edition (WPPSI-IV) to the student yielded standard scores of 69 (extremely low) in verbal comprehension, 61 (extremely low) in visual spatial, 69 (extremely low) in fluid reasoning, 54 (extremely low) in working memory, and a full scale IQ of 59 (extremely low) (id. at p. 2). The school psychologist administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), with the parent as informant, to assess the student's adaptive behavior (id. at p. 4). The report indicated the student achieved standard scores of 89 (adequate) in communication, 83 (moderately low) in daily living skills, 74 (moderately low) in socialization, 88 (adequate) in motor, and an adaptive behavior composite of 80 (moderately low) (id. at p. 5). The evaluator noted, based on clinical observations, the student exhibited below average attention and frustration tolerance and became easily distracted, including leaving her seat to move about the room (id.). With respect to an administration of the Child Behavior Checklist (CBCL) to the student, the student's T-scores fell within the normal range in the areas of internal and external problems (id.). The November 2013 psychoeducational evaluation provided comprehensive information regarding the student's needs related to cognition, ADLs, and social/emotional functioning, which provided adequate information from which to develop IEP annual goals and related service recommendations.

Notably, although the IHO indicated the May 2014 CSE based the annual goals on insufficient evaluative data, a review of the May 2014 IEP shows that the academic readiness goals aligned with the information available to the CSE. Specifically, the school psychologist testified that the student's regular education teacher and SEIT during the 2013-14 school year participated during the May 2014 CSE meeting and discussed the student's improved ELA skills and lack of progress in math (Tr. pp. 31, 33-34). The May 2014 IEP present levels of performance—which are not in dispute—reflect teacher and SEIT reports regarding the student's academic skills, including her knowledge of letters, colors, and shapes; counting skills; and ability to identify numbers (Parent Ex. C at p. 1). According to the school psychologist, the academic annual goals on the May 2014 IEP were developed from teacher and SEIT reports (Tr. pp. 80-81). A review of the May 2014 IEP reflects that the academic-based annual goals—which called for the student to explore quantities by manipulating objects and to understand concepts of words by pairing them with a picture—were in alignment with the student's needs as identified in the information the teacher and SEIT provided (id.; Parent Ex. C at pp. 1, 3-4).

A November 2013 OT evaluation report contained comprehensive information regarding the student's fine motor needs (see Tr. p. 31; Parent Ex. F). Within the November 2013 OT report, the occupational therapist described the student's physical functioning, fine motor skills, grasping skills, visual motor integration skills, ADLs, and ability to self-regulate (Parent Ex. F at pp. 1-5). The report indicated the student demonstrated a full range of motion, "good" muscle strength, and did not exhibit difficulties with ADLs and self-regulation (id. at pp. 2-5). An administration of the Peabody Developmental Motor Scales-Second Edition (PDMS-2) to the student yielded a fine motor quotient of 73 (1st percentile), indicating below average grasping and visual motor skills (id. at p. 3).

As stated above, the IHO concluded that there was insufficient evaluative information from which to develop related services recommendations and annual goals (IHO Decision at p. 12). However, consistent with the results of the OT evaluation, to address the student's fine motor needs, the May 2014 IEP contained an annual goal to improve the student's tripod grasp on a writing tool (see Parent Exs. C at p. 3; F at p. 3). Consistent with the evaluating occupational therapist's recommendation of OT services to address the student's fine motor, visual motor, and processing skills, the May 2014 CSE recommended one 30-minute individual and one 30-minute group session of OT (see Parent. Exs. C at p. 5; F at p. 5).<sup>11</sup> A review of the hearing record confirms that the OT report contained sufficient evaluative data regarding the student's fine motor needs, affording an adequate basis for the CSE to develop annual goals and determine the related services to address the student's fine motor needs.

A November 2013 speech-language evaluation thoroughly described the student's needs related to receptive and expressive language as well as articulation (see Tr. p. 31; Parent Ex. E).<sup>12</sup> An administration of the Preschool Language Scale-Fifth Edition (PLS-5) to the student yielded standard scores of 69 (moderate delay) in auditory comprehension, 71 (mild delay) in expressive communication, and 68 (moderate delay) in total language (Parent Ex. E at p. 3). The report indicated the student demonstrated difficulty maintaining a topic of conversation, below average spontaneous speech intelligibility, and mild/moderate receptive and expressive language delays (id. at p. 5).

Contrary to the IHO's conclusion that the May 2014 CSE reviewed insufficient evaluative information to develop annual goals and related service recommendations, the November 2013 speech-language evaluation report provided a thorough description of the student's language needs, which allowed the May 2014 CSE to consider adequate information in the development of the speech-language related service recommendations and to develop corresponding annual goals. To address the student's speech and language needs—and consistent with the evaluative report—the May 2014 IEP contained annual goals to improve the student's expressive language skills and ability to demonstrate an understanding of the concepts of words (see Parent Exs. C at p. 3; E). Consistent with the evaluating speech-language pathologist's recommendation for speech-language therapy (Parent Ex. E at p. 6), the CSE recommended two 30-minute sessions of speech-language therapy in a group (see Parent Ex. C at p. 5).<sup>13</sup>

The February 2014 PT evaluation report described the student's gross motor needs and provided corresponding goals (see Tr. p. 31; Parent Ex. L). The evaluating physical therapist assessed the student's gross motor needs related to stationary skills, locomotion, and object manipulation using the standardized assessment of the PDMS-2 (Parent Ex. L at pp. 1-3). According to the PDMS-2, the student's gross motor quotient of 74 indicated that her gross motor

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<sup>11</sup> The evaluating occupational therapist did not specify whether the student should receive OT services within an individual or a group setting (Parent Ex. F at pp. 1-5). In review of the purpose of OT services and the May 2014 IEP annual goal, it appears both an individual and a group setting were appropriate settings to target the skill areas (see Parent Exs. C at p. 3; F).

<sup>12</sup> The district speech-language therapist testified that the student demonstrated needs in the areas of receptive and expressive language as well as attention (Tr. pp. 278, 280-81).

<sup>13</sup> The evaluating speech-language pathologist did not specify individual or group services (Parent Ex. E at p. 6).

and functional skills acquisition were moderately delayed (*id.* at p. 3). Within her report, the evaluating physical therapist detailed goals to address the student's needs, which focused on improving upper and lower extremity strength, coordination, endurance, balance, coordination, and jumping (*id.* at pp. 3, 6).

The February 2014 PT evaluation report provided adequate information to the May 2014 CSE to determine recommendations for PT services and to develop annual goals in the area of gross motor skills. Consistent with the PT evaluative report, the IEP contained two annual goals designed to improve gross motor skills including walking stairs and jumping (see Parent Exs. C at p. 4; L). Consistent with the evaluating physical therapist's recommendation that the student required PT services (Parent Ex. L at p. 3), the May 2014 CSE recommended two 30-minute sessions of PT in a group to address the student's needs in the areas of fine motor, visual motor, and processing skills (see Parent Ex. C at p. 5).<sup>14</sup>

In light of the above, I find that the evidence in the hearing record demonstrates that the May 2014 CSE developed the annual goals and related service recommendations based on sufficient evaluative information. When, as here, the CSE had adequate information regarding the student's then-current functioning from the available evaluation reports and meeting participants, it is not necessary to conduct additional evaluations (*T.F. v. New York City Dep't of Educ.*, 2015 WL 5610769, at \*4 [S.D.N.Y. Sept. 23, 2015]; *D.B. v. New York City Dep't of Educ.*, 966 F. Supp. 2d 315, 329-31 [S.D.N.Y. 2013]). Accordingly, I reverse the IHO's finding that the May 2014 CSE had inadequate information upon which to base IEP goals or establish appropriate related services recommendations.

Additionally, although identified in her due process complaint notice and mentioned in her answer to the district's cross-appeal, the parent does not raise any specific challenges to the adequacy of the annual goals contained in the May 2014 IEP or the recommendations for related services. Similarly, although raised in the due process complaint notice, the parent raises no challenges to the district's implementation of the May 2014 IEP. Accordingly, these issues are not before me for consideration and it would be inappropriate to address them. Under other circumstances, where the IHO does not address claims raised by the parent, it may be necessary to remand the matter to the IHO (see *F.B. v. New York City Dep't of Educ.*, 923 F. Supp. 2d 570, 587-89 [S.D.N.Y. 2013]; *J.F. v. New York City Dep't of Educ.*, 2012 WL 5984915, at \*9-\*10 & n.4 [S.D.N.Y. Nov. 27, 2012]). However, because the IHO found that the student made progress during the 2014-15 school year such that compensatory relief was unnecessary, and the evidence in the hearing record provides no basis to depart from that determination, it is unnecessary to do so in this instance.

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<sup>14</sup> The evaluating physical therapist did not specify whether the student was to receive the recommended PT services in an individual or group setting (Parent Ex. L at p. 3). In review of the IEP annual goals related to gross motor skills and the student's gross motor needs, the recommendation for the student to receive PT in a group setting was appropriate. Notably, the physical therapist testified that although the student's IEP called for group PT services, the student received PT services individually because there were no other students who had similar gross motor needs (see Tr. pp. 220, 222-25).

## 2. Integrated Co-Teaching Services

The parent contends that the recommendation for ICT services in a general education class was not reasonably calculated to address the student's needs. More specifically, the parent argues that the student required a smaller class and one-to-one instruction. Upon review of the evidence in the hearing record, the IHO properly concluded that the student's needs did not warrant a special class placement and the May 2014 CSE's recommendation of ICT services in a general education classroom was reasonably calculated to provide educational benefit to the student (see IHO Decision at p. 13).

To facilitate an assessment of the May 2014 CSE's recommendations, a brief discussion of the student's needs as described in the present levels of performance included in the May 2014 IEP, although not directly at issue, is necessary to frame the discussion below. The present levels of performance in the May 2014 IEP reflected the student's needs and abilities as described in the evaluation reports available to the May 2014 CSE, as well as the participation of CSE members (see Parent Exs. C; E; F; G; J; L). For example, in accordance with the November 2013 speech-language evaluation, the IEP indicated the student demonstrated mild to moderate receptive and expressive language deficits when compared to same age peers (compare Parent Ex. E at p. 3, with Parent Ex. C at p. 1). Based on input from the student's preschool teacher, the IEP indicated the student often required assistance in the classroom and identified some letters and numbers (Parent Ex. C at p. 1). The IEP also reflected that, according to the student's SEIT, the student knew all letters, shapes, and colors, counted to 30, and identified numbers 1 through 15 (id.). The IEP also indicated the student was "a quiet child who enjoys interacting with peers" and "an easy going child who gets along well with others," as well as that she played with peers her age (id.). Consistent with the February 2014 PT evaluation, the IEP indicated the student's gross motor skills were delayed (compare Parent. Ex. L at pp. 1-3, with Parent Ex. C at p. 1). The May 2014 IEP also noted the student's difficulties with attention and her need for prompts to remain on task (Parent Ex. C at p. 1).

Turning to the parent's argument that the ICT services were inappropriate due to the student's deficits in language, attention, and academics, a review of the hearing record establishes, for the reasons set forth below, that the IHO correctly determined that the CSE's recommendation for ICT services in a general education classroom placement was appropriate (see IHO Decision at p. 13). State regulations define ICT services as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The "maximum number of students with disabilities receiving integrated co-teaching services in a class. shall not exceed 12 students" (8 NYCRR 200.6[g][1]). In addition, State regulations require that school personnel assigned to a classroom providing ICT services shall "minimally include a special education teacher and a general education teacher" (8 NYCRR 200.6[g][2]).

The May 2014 CSE recommended placement in a general education classroom with ICT services in ELA (10 periods per week), mathematics (10 periods per week), social studies (5 periods per week), and science (5 periods per week) (Parent Ex. C at p. 4). According to the school psychologist, the May 2014 CSE recommended ICT services for the student because at the time of the meeting, she was in a general education classroom receiving SEIT services (Tr. p. 32). The school psychologist indicated that the recommended placement was appropriate for the student

due to the support of the special education teacher throughout the day, and the provision of OT, PT, and speech-language therapy to address her needs in those areas (Tr. p. 32). The May 2014 IEP present levels of performance reflected, among other things, that the student required supports, but with such special education supports in place, the student demonstrated age appropriate academic skills (see Parent Ex. C at p. 1). For example, the May 2014 IEP indicated the student "often needs adult assistance in the classroom" but that according to the SEIT, the student "knows all her letters, colors, and shapes" (id.). In addition, to address the student's difficulties with following the classroom routines, attention, and distractibility, the May 2014 CSE noted the student benefited from structure including routines and clearly stated schedules and repetition, verbal prompts, and positive reinforcement should be used to keep her on task and focused (id. at pp. 1-2).

Additionally, the May 2014 CSE developed approximately seven annual goals to address the student's readiness, communication, and fine and gross motor skills (see Parent Ex. C at pp. 3-4). Specifically, the IEP contained two annual goals that targeted the student's ability to improve her understanding of quantities by manipulating objects in groups/sets and increasing her understanding of concepts of words by pairing the words with pictures and identifying common environmental words (see id. at p. 3). To address the student's difficulties with speech-language skills, the IEP included annual goals to increase her expressive language within a classroom setting by answering questions about pictures and telling a recent event, and using statements to describe objects, actions, and events (id.). The May 2014 CSE also developed annual goals to address the student's fine and gross motor skills that targeted the student's abilities to sustain a tripod grasp on a writing tool, jump, and ascend and descend stairs (id. at pp. 3-4). A review of the annual goals reveals that each annual goal included an evaluative criteria (i.e., 80 percent accuracy), an evaluation procedure (i.e., performance assessment task, verbal explanation, class activities, standardized test, teacher or provider observations, teacher made materials), and a schedule to measure the student's progress toward meeting the annual goals (i.e., one time per month) (see id.).

The May 2014 IEP also described the student as having delays in gross motor skills, visual motor integration skills, sensory processing, and difficulties with grasping, for which the CSE recommended OT and PT services (Parent Ex. C at pp. 1-5). The IEP also noted the student's mild/moderate receptive and expressive language delays, for which the CSE recommended speech-language therapy (id. at pp. 1, 3, 5).

The parent asserts that the student required a small class for the 2014-15 school year due to her cognitive and attention deficits as well as her difficulties with academics. The parent testified that an ICT setting was too large due to the student's difficulties with language, attention, and ADLs (Tr. pp. 454-55). The student's preschool teacher testified that she believed the student required a 12:1 special class and disagreed with the May 2014 CSE's recommendation for ICT services because the student was easily distracted in large groups, learned better in a small group, and that a larger class size would not assist her to progress (Tr. pp. 441-42). The preschool teacher also testified that the student responded well to one-to-one instruction and required SEIT services to make progress (Tr. pp. 403, 429-30).

However, the testimony of the school psychologist and the classroom observation report support the May 2014 CSE's recommendation for ICT services (see Tr. pp. 32-33). The school psychologist testified that ICT services were appropriate for the student because at the time of the

May 2014 CSE meeting, the student functioned within a general education preschool class with SEIT services and that within an ICT setting the student would have the support of a special education teacher throughout the day (Tr. p. 32). According to the classroom observation report, the evaluator indicated the student engaged in structured activities, responded well to simple directions and questions, and transitioned appropriately (Parent Ex. J).<sup>15</sup> Although the classroom observation reflected that the student demonstrated difficulties with attention and academic tasks, she "responded well to redirection, and behave[d] in age appropriate manner" (*id.*).

In support of ICT services, the hearing record reflects the student interacted well with peers and within an ICT setting she would have opportunities to interact with nondisabled peers (Parent Ex. C at p. 1). According to the school psychologist, the May 2014 CSE considered a 12:1+1 special class but rejected it because it would be too restrictive (Tr. pp. 32-33). In addition, despite the student's cognitive delays and struggles with academics, a May 2014 child outcomes summary form indicated the student demonstrated progress in the area of positive social/emotional skills, acquisition of knowledge and skills, and use of appropriate behaviors to meet her needs while attending a preschool general education class with SEIT support (*see* Parent Exs. C at p. 1; I at pp. 1-2).

Likewise, the evidence in the hearing record does not support a finding that the student required 1:1 instruction to learn, socialize, and progress academically. Although the student's preschool teacher testified that the student benefitted from 1:1 instruction and struggled in large-group situations, she also testified that the student's SEIT recommended that the student receive ICT services at the May 2014 CSE meeting, and that the student made progress in small-group settings (Tr. pp. 421, 423, 429, 433, 441-42). The classroom observation report did not reflect the student required a special class and one-to-one attention; rather, the student's abilities as reflected in the classroom observation report were such that ICT services offer the student an appropriate amount of support (*see* Parent Ex. J). Further, the May 2014 IEP indicated the student demonstrated appropriate play skills with same age peers and did not exhibit social or behavioral deficits (Parent Ex. C at p. 1). In addition, although the student demonstrated difficulties with attention, the May 2014 IEP indicated the student remained on task and followed the classroom routine when provided with verbal prompts (*id.*). Although the student demonstrated fine and gross motor deficits, there is no evidence in the hearing record the student was unable to navigate the school building or complete classroom tasks involving motor skills without one-to-one assistance (*see id.*; Parent Ex. J). Given the student's social, academic, language, and motor needs and abilities, the hearing record supports the IHO's finding that the May 2014 CSE's recommendation for ICT services was reasonably calculated to enable the student to receive educational benefit.

## **VII. Conclusion**

In summary, the evidence in the hearing record does not support the IHO's finding that the district failed to provide the student a FAPE during the 2014-15 school year. In light of the determination that the district provided the student with a FAPE during the 2014-15 school year,

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<sup>15</sup> The student's SEIT was present during the classroom observation (Parent Ex. J).

the IHO's order that the CSE determine whether it was necessary to provide compensatory educational services to the student is not appropriate.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated June 3, 2015, is modified, by reversing those portions which found that the district denied the student a FAPE for the 2014-15 school year and directed the CSE to determine if it would be appropriate to provide the student with compensatory educational services.

**Dated:**           **Albany, New York**  
                      **October 9, 2015**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**