



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 18-012

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

### **Appearances:**

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

## **DECISION**

### **I. Introduction**

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

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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 had previously attended a half-day center-based early intervention program five days per week and received early intervention services consisting of 10 hours of home-based applied behavior analysis (ABA) per week, five sessions of speech-language therapy per week, and two sessions of occupational therapy (OT) per week (Dist. Ex. 2 at p. 3). The student received a diagnosis of a pervasive developmental disorder, and the parents were advised to follow up with a developmental pediatrician to rule out the possibility that the student may have autism (Tr. p. 46; Dist. Ex. 2 at p. 3).

During the 2015-16 school year, a Committee on Preschool Special Education (CPSE) convened in November 2015 and January 2016, and on June 20, 2016, to determine the student's

eligibility and special education programs and services for the 2016-17 school year (Parent Ex. C at pp. 1, 3). The June 2016 CPSE found the student eligible for special education as a preschool student with a disability and for the 2016-17 school year, recommended the student receive five hours per week of special education itinerant teacher (SEIT) services to be provided at a "childcare location selected by [the] parent," as well as three 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (Parent Ex. C at pp. 1, 3, 13).

A February 5, 2017 SEIT quarterly progress report described the student's then-current skills, and progress toward the annual goals contained in the June 2016 IEP (Dist. Ex. 1; see Parent Ex. C at pp. 7-10). A February 10, 2017 speech-language progress report described the student's strengths, weaknesses, and progress, recommended that the student continue with speech-language therapy, and recommended one annual goal with 14 short-term objectives (Dist. Ex. 5). The district conducted a classroom observation of the student in his pre-kindergarten class on March 6, 2017 (Dist. Ex. 6).

A CSE convened on March 9, 2017 to determine the student's eligibility to receive services as a student with a disability for the 2017-18 school year beginning September 2017 (Dist. Ex. 2 at p. 12).<sup>1</sup> At the time of the March 2017 "turning five" CSE meeting, the student was receiving five hours per week of SEIT services within his general education preschool setting, as well as three 30-minute sessions of speech-language therapy per week (see Parent Ex. C at p. 13; Dist. Exs. 2 at p. 1; 6).<sup>2</sup> The March 2017 CSE recommended that the student receive integrated co-teaching (ICT) services for 10 periods per week in math and 15 periods per week in English language arts (ELA), as well as one 30-minute session per week of group counseling, and three 30-minute sessions per week of group speech-language therapy (Dist. Ex. 2 at p. 9).

In a prior written notice dated April 3, 2017, the district summarized the contents of the March 2017 IEP (Dist. Ex. 8). In a school location letter dated May 5, 2017, the district summarized the recommended program and identified a particular public school site to which the district assigned the student to attend for the 2017-18 school year (Dist. Ex. 9).

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

In a due process complaint notice dated September 7, 2017, and amended on September 8, 2017, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) during the 2017-18 school year (Parent Ex. A; Amended Due Process

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<sup>1</sup> The student was eligible for special education and related services through the CPSE during July and August 2017 as the New York State Education Law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend school . . ." (Educ. Law § 4410[1][i]). However, while the June 2016 CPSE recommended 12-month services for the 2016-17 school year (Parent Ex. C at p. 14), there is no indication in the hearing record that the CPSE met for an annual review prior to summer 2017.

<sup>2</sup> The March 2017 IEP indicated that the recommended CPSE OT services were "discontinued due to scheduling conflicts" (Dist. Ex. 2 at p. 3).

Complaint Notice).<sup>3</sup> The parent asserted procedural claims alleging that the March 2017 IEP was provided to the parent in English only rather than her native language, that the CSE did not provide the parent with a procedural safeguards notice, that a translator was not present during the March 2017 CSE meeting, that a member of the CSE signed the student's father's name on the attendance sheet although he did not attend the meeting, and that the CSE was not properly composed because the student's SEIT and his preschool teacher did not attend (*id.* at pp. 2, 4). Substantively, the parent alleged that the March 2017 IEP placement, program, and related services were inappropriate (*id.* at p. 4). The parent also alleged that the annual goals were deficient (*id.*). The parent requested that the student receive ICT services for social studies and science in addition to the math and English ICT services set forth on the IEP (*id.*). The parent also requested that the student's IEP be modified to include two sessions of individual speech-language therapy and two sessions in a group of three, as well as two sessions of individual OT per week (*id.*). The parent also requested five hours of home-based bilingual special education teacher support services (SETSS), and independent educational evaluations (IEEs), including psychoeducational, speech-language, and OT evaluations (*id.*). Lastly, the parent requested compensatory education in the form of 112 30-minute sessions of home-based OT to make-up for services not received from June 2016 through August 2017 (*id.*).

The parent's amended due process complaint notice also included a motion for pendency dated September 7, 2017 (Parent Ex. B).

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

A prehearing conference was held on September 15, 2017, during which the parent's September 7, 2017 pendency motion was discussed and the IHO and the parties determined the student's pendency placement (Tr. pp. 1-9; Parent Ex. B). The IHO issued an interim order on pendency, dated September 15, 2017, finding that the June 2016 IEP was the student's last agreed upon placement, and directing that the student receive five hours per week of SEIT services in the student's native language commencing from September 7, 2017 (IHO Ex. II at p. 5).

The impartial hearing continued on October 11, 2017 and concluded on December 13, 2017 after four days of proceedings (Tr. pp. 11-144). By decision dated December 29, 2017, the IHO concluded that the March 2017 IEP "offer[ed] the student a FAPE as delivered to the student with an ICT program for all academics" (IHO Decision at p. 12). In the decision, the IHO noted that some of the parent's claims had been settled, the district acknowledged that the student did not receive all the recommended OT services the prior school year and "owed" the student 92 sessions of "compensatory OT," and the "[r]emaining issue was continuation of five weekly home-based SETSS hours" (*id.* at pp. 3-4). The IHO noted that the parent's language barrier "appear[ed] to hinder [her] ability to communicate" and that the parent was "unaware of the full ICT services provided to the [s]tudent" (*id.* at p. 11). The IHO also found that the full-time ICT program provided to the student was appropriate and offered a FAPE (*id.* at pp. 11-12). The IHO

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<sup>3</sup> The due process complaint notice was amended on September 8, 2017 and although it was submitted via email to the IHO and is a part of the hearing record, the IHO did not give the document an exhibit number. The amended due process complaint notice did not change the substance of the complaint, but in the relief section it included the added detail that the SETSS requested as relief should be delivered in a 1:1 student-teacher ratio.

determined that contrary to the testimony of the SETSS provider that the student would not make progress and regress without home-based SETSS, there was no evidence of regression and the need for home-based services was not raised by any party at the March 2017 CSE meeting (*id.*). The IHO also found that the IEP included speech-language therapy and goals to address the student's expressive and receptive language delays (*id.* at pp. 10-11).

With respect to the parent's request for evaluations, the IHO found that there was no need to order IEEs at the time of the decision because the district had agreed to, and was conducting, a psychoeducational, a speech-language, and an OT evaluation (*id.* at pp. 12-14). The IHO ordered the district to provide the evaluation results to the parent in writing in her native language, ordered the district to issue a related service authorization (RSA) for the student to receive 92 30-minute OT sessions to be used by June 30, 2019, and ordered the CSE to reconvene to review the completed evaluations within 30-days of delivery of the results of the evaluations to the parent (*id.* at p. 14).

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

Through her advocate, the parent appeals and asserts that the March 2017 IEP did not offer the student a FAPE. The parent argues that the student requires five hours of SETSS at home to address needs related to focus, following directions, impulsivity, academics, "content material" reinforcement and potential regression. The parent disagrees with the IHO's findings and requests five hours of home-based SETSS for the student to work on academic goals.

In an answer, the district denies the allegations contained in the request for review and alleges that the request for review should be dismissed for failure to comply with pleading requirements. Specifically, the district asserts that the parent's request for review does not contain a clear and concise statement of the issues presented for review or identify the precise ruling or failure to rule being appealed from, does not provide grounds for reversal, and only minimally cites to the hearing record with no cites to the IHO decision or the hearing transcripts. With respect to the parent's procedural arguments, the district alleges that the March 2017 CSE meeting was properly conducted. The district further asserts that the student's need for home-based SETSS was not raised at the March 2017 CSE meeting, that the IHO properly determined that the district offered the student a FAPE, and the student did not require home-based SETSS.

In a reply to the district's answer, the parent, through her advocate, reasserts claims raised in the request for review and asserts that contrary to the district's allegation, the parent's request for review cites to the hearing transcript and record.

#### **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]).<sup>4</sup>

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

## **VI. Discussion**

### **A. Preliminary Matters — Compliance with Practice Regulations**

The district asserts that the request for review must be dismissed for failing to comply with the form requirements for pleading (see 8 NYCRR 279.8[c][2] and [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 order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in relevant part, that a request for review shall set forth:

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

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<sup>4</sup> 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).

exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number.

(4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see 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]).

The district correctly contends that the parent's request for review does not meet the form and content requirements set forth in State regulation. The parent's request for review includes allegations set forth in paragraphs numbered 1 through 8 (see generally Req. for Rev.); however, it does not specifically identify the precise rulings, failures to rule, or refusals to rule presented for review with each issue numbered and set forth separately as required by regulation (see 8 NYCRR 279.4[a], 279.8[c][3]). Additionally, although the request for review discusses the testimony of several witnesses, there are no transcript citations (id. at ¶¶ 1, 3-5, 7). Citations to several hearing record exhibits are provided—including the student's IEP, a report card, and a classroom observation—although they are not all properly cited, and no page numbers are provided (id. at ¶ 2-5, 5, 6; see Dist. Exs. 2; 6; Parent Ex. E).

While the parent's allegations were tersely stated, reasserted allegations raised in the due process complaint notice, and asserted general disagreement with the IHO's decision, the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

In this instance, the parent's failure to fully comply with the practice regulations will not ultimately result in a dismissal of the parent's appeal on that basis. However, the parent's advocate is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 17-103; see also Application of a Student with a Disability, Appeal No. 17-101; Application of a

Student with a Disability, Appeal No. 16-060).<sup>5</sup> However, in light of the foregoing, the district's arguments regarding the form of the parent's request for review are dismissed.

### **B. March 2017 IEP**

The parent argues on appeal that the student requires five hours of SETSS at home to "work on his academic goals," address needs related to his ability to focus and follow directions, and his need for content material reinforcement, redirection, and to prevent potential regression. Review of the evaluative information available to the March 2017 CSE with respect to the student's needs and abilities, including the potential need for home-based services, shows that the IHO correctly determined that the March 2017 IEP provided the student a FAPE without the provision of the home-based services sought by the parent.

While the evaluative information available to the March 2017 CSE and the present levels of performance in the resultant IEP are not in dispute, a discussion thereof provides context for the issue to be resolved, specifically, whether the CSE's recommendation for ICT and related services was reasonably calculated to provide the student with an educational benefit. Review of the evaluative information before the March 2017 CSE shows that it is consistent with the information contained in the March 2017 IEP as described below (compare Dist. Ex. 2 at pp. 1-3, with Dist. Exs. 1; 5; 6).

The March 2017 CSE had before it a February 5, 2017 physical examination report, a February 5, 2017 SEIT progress report, a February 10, 2017 speech-language progress report, and a March 6, 2017 classroom observation report (Tr. pp. 42-43, 46-47; Dist. Ex. 8 at p. 1; see Dist. Exs. 1; 5; 6). Overall, the information available to the CSE revealed that the student had made progress in his general education preschool classroom with SEIT and speech-language therapy services (see Dist. Exs. 1; 5; 6).

The February 5, 2017 SEIT progress report reflected that the student had shown improvement in his cognitive, academic, and language skills (Dist. Ex. 1). Specifically, the student had made progress toward his annual goals including participating in large group activities, understanding one-step verbal directions with and without cues, using two to three words to express his needs, labeling common objects, answering yes/no questions, sitting still on the carpet and during SEIT sessions, recognizing five common signs in his environment, and developing self-help skills (id. at pp. 3-6).

The February 10, 2017 speech-language progress report stated that the student had improved his ability to use words more than gestures to communicate, and demonstrated emerging skills, including using three to four word utterances and adjectives/modifiers and pronouns, answering yes/no and select "wh" questions with prompts, asking familiar questions, showing

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<sup>5</sup> The parent's advocate is reminded that newly enacted regulations governing the practice before the Office of State Review were amended and became effective for appeals filed on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Instructions about the amended practice regulations—as well as forms consistent with the amended practice regulations—have been provided on the Office of State Review's website under the links titled "Revised 2017 Appeals Process" and "Revised Regulations (effective 1/1/2017)" (see <http://sro.nysed.gov>).

understanding of early spatial concepts, responding consistently to his name, and engaging in eye contact, joint attention, and verbal interactions (Dist. Ex. 5 at pp. 1-2).

The student was observed in his then-current general education prekindergarten classroom on March 6, 2017 (Dist. Ex. 6). At the time of the observation, there were 17 students and two teachers in the class (id.). The student was reportedly calm, quiet, attentive, responsive, well-behaved, and followed directions (id.). The student played well with other children at a sensory table and responded appropriately to questions using one to two words, but without much eye-contact (id.). The student's teacher reported that the student was "capable but unfocused," spoke in single words without eye contact, and needed a "small class with speech service due to his difficulty following directions" (id.).

Consistent with the February 2017 SEIT progress report, the March 2017 IEP reflected the student's ability to state his name, age, and gender; identify and write the alphabet and his full name independently; sort objects according to shape and color; draw a person with recognizable body parts; rote count, identify numbers, and count using one to one correspondence up to 30; and remain seated and respond to questions/directions during circle time (compare Dist. Ex. 1 at pp. 1, 2, 5, with Dist. Ex. 2 at p. 1). Additionally, the student had shown progress in his ability to carry out two-step directions (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at pp. 1-2). In the area of self-help skills, the student reportedly used the toilet, washed his hands, fed himself with a spoon, and verbalized his needs (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 2 at p. 1). With regard to needs, the student was unable to retell story events in sequential order, was inconsistent in his ability to make predictions and inferences, named pictured objects but did not demonstrate understanding of categories, and had difficulty understanding object features (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at pp. 1-2). The student also had difficulty answering "wh" questions and was unable to make cause and effect statements (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 2). Regarding the student's social/emotional skills, both the SEIT progress report and the IEP indicated that although the student participated during circle time and followed classroom rules and routines with prompts, he exhibited decreased eye contact, inadequate play skills, and did not interact with peers (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 2 at p. 2). The IEP further indicated that the student was more easily distracted in large groups, exhibited "impulsive" behavior, was at times "self-directed," and refused to answer questions/ignored adults when he did not feel like responding (Dist. Ex. 2 at p. 1). The student was described as a visual/kinesthetic learner, and he benefitted from multisensory instruction, movement breaks, visual cues, and hands-on activities (Dist. Ex. 2 at p. 1). The IEP included management strategies such as a multisensory instructional approach, movement breaks, direct instruction for teaching vocabulary, visual cues, modeling, hands-on activities, daily drill practice of basic skills, review of previously introduced materials, use of manipulatives, technology, positive reinforcement, and a visual schedule (id. at p. 3).

In accord with the February 2017 speech-language progress report, the March 2017 IEP noted that the student reportedly exhibited mild delays in his receptive language development (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). The student followed one step verbal directions and understood simple yes/no, "what" and "who" questions, simple sentences, object uses, and early spatial concepts (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). The student reportedly displayed strength in his ability to make inferences and understand analogies, and was able to receptively identify colors, shapes, letters, and numbers (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). However, the student did not appear to understand "when," "why,"

hypothetical, and open-ended questions, complex sentences, advanced spatial and quantitative concepts, pronouns, and negatives (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). The student exhibited mild to moderate delays in his expressive language skills (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 1). Specifically, the student used words more than gestures to communicate, requested objects with prompting, produced three to four word utterances with some errors in syntax, answered simple yes/no and "wh" questions given verbal prompts, and labeled objects and actions (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 1). However, the student's vocabulary skills, and his ability to formulate and relay questions, sentences, and verbal narratives were below age expectations (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 1). In addition, the student exhibited echolalia when he was not paying attention or did not understand a question (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 1). The student reportedly exhibited mild to moderate delays in his pragmatic language development (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). The student had made progress in his ability to respond to his name, make eye contact, attend to others, make requests, label, and answer questions (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2). The student occasionally initiated communication, but exchanges continued to be difficult and limited in that he tended to use rote phrases and "echo" statements during exchanges (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 5 at p. 2).

Review of the March 2018 IEP shows that it included academic annual goals to improve the student's phonological awareness, reading readiness, listening and reading comprehension skills; the ability to ask/answer "wh" questions, recognize sight words from a kindergarten level list, and formulate sentences using specific types of words and sequence events in writing; and math reasoning and computation skills (Dist. Ex. 2 at pp. 5-6). The IEP provided speech-language annual goals to improve the student's receptive language skills including his ability to follow one and two-step directions using a variety of linguistic concepts; and expressive language skills by increasing the length of his utterances, using specific parts of speech, and answering "wh" questions (id. at pp. 7-8). A pragmatic language annual goal addressed the student's need to improve social interpersonal skills such as increasing eye contact, spontaneous greetings, and conversational exchanges (id. at p. 8). According to the IEP, the counseling annual goals addressed the student's need to improve social skills by taking turns with peers, initiating and reciprocating social interactions with peers, and verbally asking for assistance from an adult; as well as demonstrating improved coping skills and self-awareness (id. at pp. 8-9).

The hearing record shows that the March 2017 CSE considered general education, which was rejected because it would be "insufficient" to address the student's needs, and a 12:1+1 special class in a community school, which was rejected because it would be "too restrictive" (Dist. Exs. 2 at p. 13; 8 at p. 2). The March 2017 CSE ultimately recommended 10 periods per week of ICT services in math, and 15 periods per week of ICT services in ELA, as well as group counseling and group speech-language therapy (Dist. Ex. 2 at p. 9). State regulations define ICT services as "the provision of specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6[g]). The number of students with disabilities receiving ICT services within a class may not exceed 12 (8 NYCRR 200.6[g][1]). In addition, State regulations require that an ICT class must be staffed, at a minimum, with a special education teacher and a regular education teacher (8 NYCRR 200.6[g][2]).

The school psychologist testified that at the March 2017 CSE meeting, the student's then-current SEIT expressed concern about his "self-directed behavior" and difficulty following

directions, and therefore, advocated for the student to be placed in a smaller, self-contained classroom (Tr. p. 47). However, the school psychologist asserted that the student had many academic skills at the time—which included identifying all uppercase and lowercase letters in random order, recognizing sight words, and counting from 1 to 100—such that a self-contained class setting would be too restrictive for him (Tr. p. 48; see Dist. Exs. 1 at pp. 1-2, 5; 2 at p. 1). The school psychologist explained to the parents that the student needed to be in a larger, regular education classroom with nondisabled peers as role models (Tr. pp. 47-48). According to the school psychologist, ICT and related services were "most appropriate" both academically and social/emotionally for the student based on the opinion of the social worker who conducted the classroom observation, and the school psychologist's interaction with and observation of the student (Tr. pp. 42-44, 46-47, 49; Dist. Exs. 2 at p. 15; 6). The IEP indicated that the CSE recommended ICT services to support the student in the general education environment, and speech-language therapy and counseling due to the student's delays in speech-language functioning and self-directed behaviors, respectively (Dist. Exs. 2 at p. 13; 8 at p. 2). Notably, both the parent and the school psychologist who attended the March 2017 CSE meeting testified that there was no discussion during the meeting regarding the parent's desire for home-based special education services (Tr. pp. 48-49, 109-10).

The student's mother testified that the student required home-based SETSS because the student was "not focused," the ICT services were provided only for ELA and math, and she felt he needed "more help" (Tr. pp. 106-07). However, the school psychologist from the school the student attended during the 2017-18 school year beginning September 2017 testified that there was, in fact, a special education teacher in the student's ICT class for the entire day (Tr. pp. 132, 134).<sup>6</sup>

One might argue that the IHO's reliance on the full-time ICT program "as delivered" as being appropriate for the student, rather than ICT services only for math and ELA as set forth on the March 2017 IEP, constituted an impermissible use of retrospective testimony by the IHO (IHO Decision at p. 12; Dist. Ex. 2 at p. 9; see R.E., 694 F.3d at 186 ["retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a Burlington/Carter proceeding"]). Alternatively, one might view the testimony concerning how the recommended ICT services were implemented as an allowable instance of testimony that explained or justified the services listed in the March 2017 IEP (see R.E., 694 F.3d at 188 ["an IEP must be evaluated prospectively as of the time it was created"]; see also E.M. v. N.Y. City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'" [internal citations omitted])). In any event, I need not make that determination because the hearing record supports a finding that the scope of the ICT services set forth on the IEP was reasonably calculated to enable the student to obtain an educational benefit even in the absence of the hearing testimony and evidence that explained that the IEP provided a full-day ICT program.

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<sup>6</sup> Additionally, the student's first quarter report card identified two teachers for all the student's subjects (Parent Ex. E).

Further information elicited during the hearing, which was unavailable to the March 2017 CSE, included the testimony of the teacher who began providing the student's home-based "SEIT" services in September 2017 under pendency indicating that her "main concern" was that the student needed help with comprehension, math problems, word problems, and writing (Tr. pp. 80-81).<sup>7</sup> She described the student as "impulsive" and in need of constant redirection to focus on tasks (Tr. pp. 81-82). The teacher also stated that the student had difficulty retaining information he learned without reinforcement, and she opined that the student's progress would be "slow and tedious" without the support of SEIT services (Tr. p. 85). As to her first concern, the March 2017 IEP identified the student's academic strengths and weaknesses, and provided ICT services in both ELA and math to address the academic areas the teacher identified as areas of difficulty (compare Tr. pp. 80-81, with Dist. Ex. 2 at pp. 1-3, 9).<sup>8</sup> To improve identified needs in focus and engagement, the IEP provided the student with management strategies including multisensory instructional approaches, built-in movement breaks, visual cues, interactive hands-on activities, positive reinforcement, and the presence of two teachers in the classroom during, at a minimum, ELA and math instruction (compare Tr. pp. 81-81, with Dist. Ex. 2 at pp. 1-3, 9). Although the teacher testified that the student needed her support to work on the annual goals contained in the March 2017 IEP and implied the student was having difficulty with them, her testimony took place in November 2017 approximately 6 months prior to when the student was projected to have met the annual goals contained in the March 2017 IEP (compare Tr. pp. 84-88, with Dist. Ex. 2 at 5-6, 10),<sup>9</sup> and the teacher acknowledged he could meet them, testifying "I'm not saying that [the student] won't" be able to achieve the annual goals within the year (Tr. pp. 95-96). She further opined that the student's progress would be "limited," and that he would "probably" regress without "support"; however, she acknowledged that the student would receive support from a special education teacher according to the March 2017 IEP (Tr. pp. 92, 96; see Dist. Ex. 2 at p. 9).

Overall, the hearing record reveals that the student made progress during the 2016-17 school year in a general education preschool program while receiving speech-language therapy and only five hours of in-school SEIT support per week (see Tr. pp. 91-92; Parent Ex. C at p. 13 Dist. Exs. 1; 5; 6). The March 2017 IEP provided the student with 25 periods per week of in-class ICT services provided by a special education teacher in his academic areas of need (Dist. Ex. 2 at p. 9). The IEP also provided management strategies to address the student's need to improve attention and focus, counseling, and speech-language therapy (id. at pp. 3, 9). Upon careful review, the hearing record indicates that the program recommended in the March 2017 IEP was sufficient to enable the student to receive educational benefits, reflects that the district offered the student an

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<sup>7</sup> The teacher used both the terms "SEIT" and "SETSS" to describe the service she provided; however, the pendency order stipulated that the student would receive "SEIT" services during pendency (Tr. pp. 81, 94, 123, 143; Parent Ex. G; IHO Ex. II at pp. 2, 5).

<sup>8</sup> Although the teacher opined that the student "probably" needed help in other subjects such as social studies, I note that the student was in kindergarten during the year in question, and the academic needs identified that are not in dispute are related to skills needed for ELA and math, and not subject specific areas such as science or social studies (Tr. pp. 88, 93; see Tr. p. 109, Dist. Ex. 2 at pp. 1-3).

<sup>9</sup> The teacher did not provide instruction to the student during the 2016-17 school year and was not a member of the March 2017 CSE meeting (Tr. p. 90; Dist. Ex. 2 at p. 15). She testified that her knowledge of the student was based on her observation and the IEP (Tr. p. 91).

appropriate educational program that could address the student's needs during the school day without home-based services, and that the student did not require home-based SETSS services in order to receive a FAPE.

## **VII. Conclusion**

Having determined that the evidence in the hearing record establishes that the IHO correctly determined that the district offered the student a FAPE for the 2017-18 school year, the necessary inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
April 2, 2018**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**