



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-102

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:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 respondent's (the district's) Committee on Preschool Special Education (CPSE) had recommended for her daughter for a portion of 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 Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student exhibited failure to thrive and overall developmental delays as an infant and received a diagnosis of cerebral palsy at the age of six months old (Dist. Exs. 2 at p. 1; 3 at p. 1). The student received physical therapy (PT), occupational therapy (OT), speech-language/feeding therapy, vision therapy, and special instruction through the early intervention (EI) program (Dist. Exs. 2 at p. 1; 3 at p. 1).¹ According to the student's EI related services progress reports from

¹ The parent discontinued the special instruction prior to the student aging out of EI (Parent Ex. 3 at p. 1).

December 2016 through April 2017, the student received home-based PT, OT, and speech-language therapy services (see Parent Ex. A).

In January 2017, PT, OT, and speech-language evaluations of the student were conducted to determine her level of functioning in anticipation of her transition to receiving services through the CPSE (Dist. Exs. 1 at p. 3; 2 at p. 1; 3 at p. 1). In July 2017, the parent obtained twice weekly individual speech-language therapy for the student from a private agency, which was delivered utilizing the Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT) method (Parent Ex. B at pp. 1-2, 5; Dist. Ex. 4 at p. 2).

The student began attending a 10:1+3 special class preschool program in September 2017 and received three 30-minute individual sessions per week each of PT, OT, and bilingual speech-language/feeding therapy at school, as well as vision services (see Tr. pp. 24, 71; Dist. Exs. 4 at p. 2; 5 at p. 1; 7 at p. 1; 8 at p. 1).² In a letter dated November 3, 2017, the parent requested that the district provide a "[d]ual recommendation" for the student to receive two 30-minute sessions per week of speech-language therapy using the PROMPT method to be provided by the private agency (Dist. Ex. 4).³

On February 15, 2018, a CPSE convened in response to the parent's letter (Dist. Exs. 4; 9 at p. 3). The student remained eligible for special education and related services as a preschool student with a disability and the CPSE continued to recommend a 10:1+3 special class placement with related services to be provided within the school setting consisting of three 30-minute sessions per week each of individual PT, OT, and speech-language therapy (compare Dist. Exs. 5 at p. 1; 7 at p. 1; 8 at p. 1, with Dist. Ex. 9 at p. 17). The CPSE also recommended the services of a one-to-one paraprofessional, a speech-generating assistive technology device, services on a 12-month basis, and special transportation (Dist. Ex. 9 at pp. 17-18, 20). In addition, the CPSE recommended two sessions per month of vision education services to be provided by an outside agency in the student's home (id. at p. 1).

² The hearing record does not include a copy of the student's original IEP for the 2017-18 school year.

³ The phrase "dual recommendation" is not explicitly defined in the hearing record; however, in response to inquiry from the IHO, the parent responded affirmatively that, when she used the phrase, she meant that the subject services would be delivered "at home in addition to having them in school" (Tr. p. 66). The parent also used the phrase "dual recommendations" to question a witness, adding the detail that the services be provided "outside of school" (Tr. p. 45). According to the evidence in the hearing record, the student received private speech-language therapy in the provider's office (Parent Ex. B at p. 1), so it is not entirely clear whether the parent sought after-school services for the student in the home or just in a location outside of school. Accordingly, for purposes of this decision, the phrase is understood to mean a recommendation for services to be delivered after school, whether in the student's home or in another location such as a provider's office, which are in addition to the recommendation for special education services during the school day, and will be referred to with the more commonly used descriptor of "extended day services" (see, e.g., Application of a Student with a Disability, Appeal No. 16-028; Application of a Student with a Disability, Appeal No. 14-040; Application of the Dep't of Educ., Appeal No. 13-049; Application of a Student with a Disability, Appeal No. 12-162; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," at p. 38, Office of Special Educ. Mem. [Apr. 2011] [referring to a CSE's recommendation for "an extended school day"], available at <http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf>).

By final notice of recommendation dated February 15, 2018, the district summarized the special education and related services recommended in the February 2018 IEP and requested the parent's signature if she agreed with the final recommendation (see Dist. Ex. 10). The parent signed the form on the same day (id.).

A. Due Process Complaint Notice

By due process complaint notice dated March 6, 2018, the parent indicated her disagreement with the recommendation of the February 2018 CPSE (Dist. Ex. 11). The parent alleged that she had requested a "dual recommendation" of related services for the student, which the February 2018 CPSE denied (id. at pp. 2, 3). The parent alleged that the five-hour school day was insufficient to address the "many aspects of [the student's] development that need[ed] improvement" (id.). As a solution, the parent requested that the student receive a "dual recommendation" for PT, OT, and speech-language therapy (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was held on June 25, 2018 (Tr. pp. 1-77). By decision dated August 9, 2018, the IHO determined that the district had offered the student a FAPE for the 2017-18 school year (IHO Decision at p. 7). Specifically, the IHO found that the student had demonstrated progress while attending a 10:1+3 special class as reported by her classroom teacher and also in the areas of PT, OT, and speech-language therapy, as reported by her individual providers (id. at pp. 3-4, 7). The IHO noted that the educational director of the student's preschool (director) testified that the student had significant needs and should receive therapy at home so that the student could be present in the classroom for longer periods of time (id. at pp. 4, 7).⁴ The IHO also acknowledged testimony from some of the student's therapists "that all students could benefit from more therapy" (id. at pp. 3-4, 7). Nevertheless, the IHO found that the evidence showed that the IEP was "reasonably calculated to enable the student to make progress appropriate in light of . . . her circumstances" (id.).

With respect to the parent's preference for PROMPT therapy, the IHO considered the testimony of the parent that the student had received PROMPT therapy outside of school and had shown regression during a time period when therapy was temporarily stopped (IHO Decision at p. 4). The IHO acknowledged that the student's PROMPT therapist had recommended more services for the student but noted that the PROMPT therapist did not testify at the impartial hearing (id. at p. 7). Based on the foregoing, the IHO found that the district offered the student a FAPE for the 2017-18 school year and denied the parent's request for additional PT, OT, and speech-language therapy services (id.).

⁴ The IHO also summarized the testimony of the director that staff spent too much time setting the student up to learn, which required putting her in the right position, making sure her head device was available, and making sure that all the adaptive equipment was available, which took time away from instruction (IHO Decision at p. 4). The IHO further acknowledged the director's testimony that the student had made minimal improvement in gross motor functioning but noted that the director conceded that she was not a physical therapist (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred by denying her request for a "dual recommendation" to consist of services in addition to the services the student was receiving in school, including three 30-minute sessions each of individual PT, OT, and speech-language therapy. The parent argues that, in order to provide the student a FAPE, the district must address the discrepancy between the student's cognitive gains and physical gains. The parent alleges that the student's educational program should result in the student's "'significant' improvement in all areas of deficit," "not just cognitive goals," and that "'some progress' in her physical areas" was insufficient.

With respect to the PROMPT method of speech-language therapy, the parent alleges that the IHO erred in failing to give weight to evidence of the student's regression during a three-month period without PROMPT therapy. The parent notes that, as the IHO indicated, an IEP must produce progress, not regression.

In summary, the parent alleges that a five-hour school day is not enough time to address all of the student's deficits set forth in the IEP and, as relief, requests extended day services in the areas of PT, OT, and speech-language therapy.

In an answer, the district denies the parent's allegations and requests that the IHO's decision be upheld in its entirety.

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" (Andrew 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 Andrew 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]).⁵

Except for in circumstances not applicable here, the burden of proof is on the school district during an impartial hearing (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. Extended Day Services

The crux of the parent's appeal is that the student required additional related services outside of the school day in order to receive a FAPE. Evidence relevant to the parent's claim includes evaluations completed by the district in January 2017 in anticipation of the student's transition to receiving services from the CPSE (see Dist. Exs. 1-3), December 2017 progress reports completed by the student's preschool providers (see Dist. Exs. 5-8), the February 2018 CPSE's recommendations (see Dist. Ex. 9), as well as testimony from the impartial hearing. Evidence pertaining to each related service area for which the parent requests extended day services is given separate treatment below.

According to the January 2017 PT evaluation report, the student achieved subtest scores below the first percentile on the Peabody Developmental Motor Scales-2 (PDMS-2) in the area of gross motor skills (Dist. Ex. 2 at p. 3). The student exhibited limited mobility, low muscle tone in her trunk and neck, and increased muscle tone in her extremities (id.). The report indicated that the student had poor muscle strength and motor control, and all "righting and protective reactions" were absent (id.). She did not exhibit consistent head control or the ability to roll, control her arm and leg movement, or sit independently, nor did she take any steps during the assessment (id. at pp. 2-3). Overall, the student exhibited very poor gross motor skills, had minimal functional movement, and was dependent on others for positioning, transitions, locomotion, and activities of daily living (id. at p. 3).

In a December 1, 2017 PT quarterly report of progress, the physical therapist indicated that the student had made "some progress" toward her PT annual goals, namely to improve functional movement while lying down and improve head control in all positions (Dist. Ex. 5 at p. 3). The physical therapist reported that the student was "working hard in therapy sessions" and that the student's goals were achievable by the projected date of the annual review (id.). Additionally, the physical therapist recommended continuing the student's physical therapy recommendation of three 30-minute individual sessions per week (id. at p. 4).

At the impartial hearing, the student's physical therapist from the preschool program testified that she had been providing three 30-minute sessions of PT to the student since September

⁵ 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).

2017 (Tr. pp. 48-50). In September 2017, the student needed more assistance with transitioning, rolling on the floor, getting into quadruped position, and sitting up (Tr. p. 50). The physical therapist confirmed that the student had made progress in these areas, in that the student now required less assistance (Tr. p. 51). Specifically, whereas initially the student required maximum assistance for rolling, she now needed moderate to minimal assistance, as well as minimal assistance to maintain a quadruped position and sit in a chair (*id.*). She also confirmed that the student was able to walk for a longer distance before taking a break (Tr. pp. 52, 54). The physical therapist testified that the student had made progress toward her IEP goals with the amount of PT she was receiving (Tr. p. 52). Finally, although the physical therapist acknowledged that all students with a physical disability "would benefit from additional therapy," she stated that the student in this case had made progress since the beginning of the school year (Tr. p. 55).

Turning to the student's needs in the area of OT, according to the January 11, 2017 OT evaluation report, results from an administration of the PDMS-2 indicated that the student achieved fine motor and visual motor subtest scores below the first percentile, and exhibited significant fluctuating tone affecting her functional motor skills (Dist. Ex. 1 at p. 3). The student exhibited low oral tone resulting in an open mouth posture and drooling (*id.* at p. 2). According to the report, the student exhibited delays in her upper extremity and fine motor skills and that, while she attempted to reach for an object, she did not grasp it unless her palm was stimulated and she was given maximum assistance and cues (*id.*). The student demonstrated visual motor delays, "with fair visual tracking to midline and laterally," but was reportedly unable to copy designs or string beads (*id.*). The report indicated that the student could be somewhat resistant to touch, indicating possible sensory modulation issues, and that she demonstrated "fair" sensory processing skills (*id.*). Cognitively, the student required maximum cues to participate in tasks and follow directions due to her motor issues (*id.* at p. 3).

According to the December 14, 2017 OT progress report, the student had "made progress since September" (Dist. Ex. 7 at p. 1). Specifically, the student had made "some progress" toward her goal to increase her overall fine motor skills including reaching, grasping, and releasing (*id.* at p. 2). In addition, the student had made "significant progress" in her ability to visually "track in all directions" (*id.*). Further, the student had made "some progress" in her ability to "modulate herself to focus" and attend to tasks (*id.* at p. 3). Finally, the report explained that the goals were achievable by the projected date of annual review, and the occupational therapist recommended continuing the student's then-current frequency and duration of OT services (*id.*).

The student's occupational therapist testified that she had been providing three 30-minute sessions of OT per week to the student since September 2017 (Tr. p. 58). When she began working with the student, the student had difficulty reaching for objects, needed help to open her hand to hold objects, and tilted her head due to weakness (Tr. pp. 58-59). The occupational therapist confirmed that the student had made progress in these areas, specifically that she was now able to open her hand and reach for objects, hold onto a swing rope, and hold her head upright more (Tr. pp. 59-60). She further testified that the student had benefitted from the occupational therapy services at the current frequency and duration, but that "any child" would benefit from more therapy (Tr. pp. 60-61).

As for the student's speech-language needs, the January 2017 bilingual speech-language evaluation report indicated that the student was functioning at the six to nine-month age level

overall according to results of an administration of the Rosetti Infant Toddler Language Scale (Dist. Ex. 3 at p. 2). The student attended to her name when called, exhibited eye contact, and recognized familiar people (id. at pp. 3-4). Although the report indicated that the student was non-verbal, she communicated primarily through eye gaze, crying, smiling, and laughing, and produced sounds during the evaluation (id. at p. 4). The student identified some pictures of common objects and followed one-step directions using eye gaze, and, by report, identified basic body parts (id.).

According to the December 15, 2017 speech-language therapy progress report, although the student's progress toward using a speech-generating augmentative communication device was hindered by her poor head control and refusal to sit in a therapeutic chair, at the time of the report, she had recently begun producing consonant-vowel ("na-na-na") and vowel-consonant-vowel ("a-na") combinations (Dist. Ex. 8 at pp. 1-2). Additionally, the student exhibited decreased tongue thrust during spoon feeding (id. at p. 1). The bilingual speech-language pathologist reported that the student made "some progress" toward all of her speech goals (id. at pp. 2-3). Specifically, the student improved her ability to more consistently respond to questions and indicate her needs, use vocalizations, and exhibit improved pragmatic language skills (id.). Finally, the student was expected to achieve her speech-language goals by the next annual review, and the bilingual speech-language pathologist recommended maintaining the student's then-current frequency and duration of speech-language services (id. at p. 3).

The bilingual speech-language pathologist testified that she had provided three 30-minute individual sessions per week of in-school speech-language therapy to the student since September 2017 (Tr. pp. 32-34, 42). According to the bilingual speech-language pathologist, the student initially presented as a nonverbal child, with very limited means of communication, who used facial expressions and eye gaze to communicate (Tr. p. 34). The student reportedly cried "extensively" for much of the year, which made it difficult to assess what she was able to do (id.). The bilingual speech-language pathologist confirmed that the student had "absolutely" made progress in her communication and speech skills, as now she used eye gaze "very effectively" to answer questions and make her needs known (Tr. pp. 34-35). The student had also begun using her "my Tobii" device, and now answered yes/no questions and used eye gaze more consistently and effectively (Tr. pp. 35-36). According to the bilingual speech-language pathologist, the student had previously been difficult to assess, but she was now more able to use her device to demonstrate her abilities (Tr. pp. 34-36). The bilingual speech-language pathologist further explained that the student often cried and threw tantrums when she was seated in her chair, which made it very difficult for her to use her communication device, but that recently she was tolerating more use of her chair and accordingly was learning to use her "my Tobii" device "very, very quickly" (Tr. p. 39). For example, the student was now answering questions, identifying nouns, and identifying her classmates using the device (id.). The bilingual speech-language pathologist opined that, since the student started using her "my Tobii" device, she was happier, more content, and less frustrated as evidenced by her reduced crying and fewer tantrums (id.). According to the bilingual speech-language pathologist, the student had made progress toward the goals identified in the December 2017 speech-language quarterly progress report (Tr. pp. 36-37). The bilingual speech-language pathologist confirmed that the amount of speech-language therapy services that the student was receiving was sufficient to meet her needs, and indicated she did not know whether additional services would provide the student with a higher rate of progress (Tr. pp. 44-46).

The district representative who attended the February 2018 CPSE meeting testified that she first became involved with the student when she received a letter from the parent in November 2017 requesting a "dual recommendation" for speech-language therapy services (Tr. p. 19; Dist. Ex. 9 at p. 2). Subsequently, the district representative requested updated progress reports from the student's preschool and held a "reconvene" meeting in February 2018 (Tr. p. 20). At the February 2018 CPSE meeting, committee members reviewed the student's December 2017 PT, OT, speech-language therapy, and educational progress reports (Tr. pp. 21-23; see Dist. Exs. 5; 6; 7; 8). The district representative testified that the student's academic needs were discussed at the meeting and that the director confirmed that the student was making progress in the classroom (Tr. p. 25; see Tr. p. 64; Dist. Ex. 9 at p. 2). The district representative stated that the February 2018 CPSE determined that the student was making progress with the current level of services and receiving educational benefits (Tr. p. 26).⁶

The resultant February 2018 IEP present levels of performance—which are not in dispute on appeal—reflect the progress the student made according to the December 2017 progress reports, and the discussion held at the CPSE meeting (compare Tr. pp. 25-26, and Dist. Exs. 5-8, with Dist. Ex. 9 at pp. 3-6). Specifically related to her gross and fine motor skills, the IEP indicated that the student had shown an increased ability to move her arms "more and more often during play," so that she could now independently reach and play with toys placed near her and, at times, moved her arms independently to press a switch to activate a cause and effect toy (Dist. Ex. 9 at pp. 3, 4). The student was reportedly "becoming more able to physically try to manipulate materials," getting stronger by using her trunk, and exhibited improved reach, grasp and release, and the ability to open and close her hands more easily (id. at pp. 4, 6). Although at the beginning of the school year the student did not sit in her chair without crying, the IEP indicated that the student now sat in her adapted chair for various routines and activities (id. at p. 5). According to the IEP, the student was beginning to visually attend to objects held in her hand, raise her arms to shoulder level independently, bear weight on open hands with trunk support, and scribble with a marker (id. at p. 6). In the areas of oral motor skills and communication, the IEP indicated that, since beginning preschool, the student had improved her ability to keep food in her mouth during meals and exhibited decreased tongue thrust during spoon feeding (id. at pp. 3, 4). The student communicated using eye gaze, facial expression, and increasingly with vocalizations such as approximations for "yes" and "no" (id. at p. 3). The IEP reflected that the student was "now joining in some vocal imitation activities," "vocalizing more in general," and more recently, producing consonant-vowel and vowel-consonant-vowel combinations (id. at pp. 4, 5). Additionally, the student had begun making choices using eye gaze when offered two objects, toys, or foods (id. at p. 4). Regarding improved skills in the classroom, the IEP indicated that the student was "more aware of her surroundings since beginning school" and exhibited "much improvement" in the area of coping skills, as she was now more able to accept class rules and routines, sit in her chair for activities without crying, accept changes in positioning without fussing, be redirected when upset, and at times "answer a question about what she needs or wants" (id. at pp. 4, 5). The student had made a "great deal of progress" in that she "rarely" cried anymore "when she did not want to do

⁶ The district representative stated that the parent did not express disagreement with the class placement or services recommended at the February 2018 CPSE meeting, but did express disagreement with the denial of the PROMPT services (Tr. p. 28).

something" (id. at p. 4). The student was "now interested in participating in all class activities," able to join the class in a multitude of activities, and was making "good, steady progress" (id.).

On appeal, the parent points to the testimony of the director as support for her request for extended day services. At the hearing, the director asserted that, because the student exhibited "significant needs across the board," she needed both additional related services and to spend time in her classroom (Tr. p. 64). She testified that the student's physical impairments exacerbated her delays and that cognitively she had more potential than she was able to demonstrate due to her physical limitations (Tr. p. 65). The director also testified that the student's needs were "intensive," and that she would benefit from more related services, but that removing her from the classroom for more therapy would not be appropriate as her cognitive skills were "fairly intact" (Tr. pp. 65-66). In addition, the director stated that the student's therapists spent considerable time "setting her up to learn" and that, therefore, it would be difficult to add more therapy to her already busy five-hour school day schedule (see Tr. pp. 66-67).⁷

However, despite the director's opinion that the student needed more therapy, in addition to the progress described in the December 2017 PT, OT, and speech-language progress reports summarized above—and the recommendations of the student's providers that the student continue receiving the same frequency and duration of related services (Dist. Exs. 5 at p. 4; 7 at p. 3; 8 at p. 3)—the December 7, 2017 education progress report shows that the progress observed in the student's related service sessions resulted in improved classroom performance (compare Dist. Ex. 6, with Dist. Exs. 5; 7; 8). For example, the education progress report indicated that the student had adjusted to the classroom although "positioning continue[d] to be an issue" (Dist. Ex. 6 at p. 1). The teacher reported that the student displayed an inconsistent interest in sitting in her chair for meals and table top activities, although this had "significantly improved" since September (id.). Specifically, the student had initially been resistant to sitting in a chair rather than on someone's lap, but this had improved, and the student was now willing to sit "happily and productively" in her chair for activities (id.). The student reportedly had made "much progress" in participating in various individual and group activities, and interacting with peers including during circle time and vocal imitation activities (id. at pp. 1-2). The student's communication skills had improved in that she vocalized more "in general," produced an increased number of sounds, more consistently responded to questions, and indicated her needs "using vocalizations, eye gaze, head turning and arm movements" (id. at p. 2). At the time of the report, the student was learning how to use an "augmentative communication speech generating device via eye gaze activation" (id.). The teacher further reported that "lately," the student moved her arms independently on an increasing basis in order to reach for and play with toys (id.). Additionally, the student was also learning to activate cause and effect toys by using a switch and at times demonstrated this skill independently (id.). The student demonstrated improved eating skills, as she was at the time of the report sitting in her chair more frequently during meal time and keeping food in her mouth (id.). Finally, the teacher reported that the student had made "significant progress" since the start of the school year and was

⁷ The director opined that the student had made "minimal" improvements in her gross motor functioning, but also acknowledged that she is not a physical therapist (Tr. p. 68).

more able to "incorporate adaptations into her repertoire" in order to demonstrate her understanding of academic concepts (*id.* at p. 4).⁸

With respect to the parent's argument about the discrepancy between the student's cognitive gains and physical gains, initially, the progress reports cited by the parent to reflect that the student made "significant progress" academically but only "some progress" toward achieving her PT and OT goals, do not demonstrate the "discrepancy" that the parent posits. There is no support in the hearing record for conceiving a discrepancy in the student's skills based on characterizations of the student's progress contained in quarterly progress reports (*see* Dist. Exs. 5-8). Further, the "substantial progress" to which the education progress report referred was in all functional areas and did not specifically reference the student's progress in the cognitive realm (*see* Dist. Ex. 6 at p. 4). For example, as summarized above, the educational progress report described the student's progress with positioning and movement, her interactions with peers, her communication, and her eating skills (*id.* at pp. 1-2). Moreover, to the extent that the parent seeks the district's "help" to allow the student to bridge the "gap," the December 2017 educational progress report described how the student was achieving the same in the recommended program, in that the student had begun "incorporat[ing] adaptations into her repertoire" in order to "demonstrate her ability to understand some academic concepts" (*id.* at p. 4). While the director testified that the student's physical impairments exacerbated her delays and that cognitively she had more potential than she was able to demonstrate due to physical limitations (Tr. p. 65), the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (*Endrew F.*, 137 S. Ct. at 1001). As summarized above, the student was making progress appropriate in light of the circumstances of her physical limitations. While the student's rate of progress may not have been the "'significant' improvement in all areas of deficit in the IEP" that the parent describes (Req. for Rev. at p. 2), it was steady over the course of the school year and the IEP was "individually tailored to [her] unique mix of strengths and deficits" (*F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist.*, 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018]).

Further, while the student's physical therapist, occupational therapist, and the director testified that the student would benefit from additional therapy (Tr. pp. 55, 60-61, 65-66), the physical therapist and occupational therapist noted that this was true for all students (Tr. pp. 55, 60-61). The director testified that the student's "needs are so intensive that it wouldn't be honest for me to say that she couldn't benefit from more. But within the five-hour school day that she has, that would then not give her access to the classroom environment I'd be giving up one thing for something else" (Tr. pp. 65-66). Notwithstanding this testimony, none of the providers testified—and the evidence in the hearing record does not reflect—that the student required additional related services in order to receive a FAPE. Rather, the parent's desire for extended day services represents her understandable desire for the student to receive greater educational benefits through the auspices of special education, but a district is not required to maximize a student's educational opportunity (*Rowley*, 458 U.S. at 189, 199; *Grim*, 346 F.3d at 379; *Walczak*, 142 F.3d at 132).

⁸ The education progress report provided new classroom goals for the student as the then-current goals were "too broad in scope" and purportedly not achievable by the projected date of the annual review (Dist. Ex. 6 at pp. 3-5).

The hearing record does not reflect that the student required extended day services in order to receive an educational benefit from her school program and, as such, they were not required for the provision of a FAPE (see Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day], appeal dismissed 17-cv-1150 [2d Cir. Oct. 23, 2017]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014] [finding no denial of FAPE based on the CSE's failure to recommend a home-based program, noting evidence that the student would make progress without the home services, "even if not at the same rate"]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 360 [S.D.N.Y. 2010] [noting that, while some skills areas may be difficult to address in school, "such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress"]).⁹

In the instant case, the February 2018 CPSE recommended a 10:1+3 special class along with three 30-minute sessions per week of individual PT, OT, and speech-language therapy to be provided in school (Dist. Ex. 9 at pp. 1, 17). As discussed above, the hearing record shows that the student was making progress with the frequency and duration of related services she was receiving during the 2017-18 school year at the time of the February 2018 CPSE meeting, such that the related services recommendations included in the February 2018 IEP offered the student a FAPE. Accordingly—and consistent with the IHO's decision—the evidence in the hearing record reveals that the special education program offered in the February 2018 IEP addressed the student's identified needs such that extended school day services were not required (see IHO Decision at p. 7; see generally Dist. Ex. 9).

B. Methodology--PROMPT

To the extent the parent asserts that the IHO erred in finding that the district offered the student a FAPE because the February 2018 CPSE failed to recommend the PROMPT approach for the student's speech-language therapy, generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad

⁹ In addition, several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]).

methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]; see M.L., 2014 WL 1301957, at *12 [finding in favor of a district where the hearing record did not "demonstrate[] that [the student] would not be responsive to a different methodology"]]).

The hearing record shows that the student began receiving private speech-language intervention twice per week outside of school in July 2017, utilizing the PROMPT therapy approach (Parent Ex. B at p. 1). According to the October 28, 2017 speech-language report prepared by the private speech-language pathologist, the student demonstrated "deficiencies in all levels of the Motor Speech Hierarchy" (id. at p. 2). Specifically: the student's "overall body tone" was low; she exhibited inconsistent "[b]reath support and phonatory control" and "limited range and control of the jaw," which was improved "only when given PROMPT parameter support"; she lacked "labial-facial control," which responded to PROMPT support; and she lacked "efficient control of the different aspects of her tongue" (id. at pp. 2-3). The student exhibited a severe delay in her articulation skills but had "grown" her "sound repertoire" using the PROMPT approach (id. at p. 3). According to the report, the student's receptive language skills, although a relative strength for her, were moderately delayed (id. at pp. 4, 5). The student identified some colors, shapes, object pictures, and actions in a field of 2-3 and demonstrated understanding of simple wh-questions using eye gaze (id. at p. 4). In the area of expressive language, the student had shown emerging ability to make simple requests through "word approximations" (id.). Finally, the private speech-language pathologist opined that the student had benefitted from the PROMPT approach and that it was "the only effective approach to date" (id. at pp. 4, 5). She indicated that an increase in the frequency of speech-language therapy to four 30-minute individual sessions per week "may benefit" the student (id. at p. 5).

The district representative stated that PROMPT therapy was discussed at the February 2018 CPSE meeting, but did not indicate that the CPSE had or reviewed the October 2017 PROMPT therapy report (see Tr. pp. 21-23, 26). Although the district representative testified that the parent expressed that the PROMPT therapy was "useful" for the student, the CPSE determined that the student was making progress with the "therapies that were in place" and that she was "currently receiving educational benefits," therefore, it did not specifically recommend that she receive therapy using the PROMPT method on her IEP (Tr. p. 26; see Dist. Ex. 9).

As described above, the student's in-school speech-language pathologist documented and testified about the progress the student made with the therapy she received at school (Tr. pp. 34-39; Dist. Ex. 8). Although the parent alleges that the student's ability to make sounds "regressed" following a three-month break from the private PROMPT therapy, and is correct that the district must develop an IEP "likely to produce progress, not regression," this information—reflected in a June 8, 2018 private PROMPT therapy report—post-dated and was not available to the February 2018 CPSE (Tr. pp. 72-73; Parent Ex. C).¹⁰ Information not available to a CSE may not be relied

¹⁰ Specifically, the June 2018 PROMPT therapy report indicated that, after the break in services, the student was no longer able to produce vocalizations during greetings and exhibited reduced use of vowel sounds and word approximations (Parent Ex. C at p. 4). The report further stated that the student demonstrated a "significant regression in acquired skills" (id. at pp. 4-5).

upon to rehabilitate a defective IEP or invalidate a substantively appropriate IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]).

Based on the foregoing, there is no reason to disturb the IHO's determination that the district offered the student a FAPE for the 2017-18 school year.

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2017-18 school year, the parent is not entitled to relief and the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
October 12, 2018**

**CAROL H. HAUGE
STATE REVIEW OFFICER**