



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-001

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:

The Legal Aid Society, attorneys for petitioner, by Susan J. Horwitz, Esq., and Tracey Discepolo, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Mary H. Park, 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 Preschool Special Education (CPSE) had recommended for his 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 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's educational history includes a diagnosis of autism spectrum disorder (ASD) (Dist. Exs. 5 at p. 1; 6 at p. 1). The student received services through early intervention (EI)

consisting of speech-language therapy, physical therapy (PT), occupational therapy (OT), and home-based applied behavior analysis (ABA) (Dist. Exs. 5 at p. 1; 6 at p. 1; see Tr. pp. 154-55).¹

The district conducted a bilingual psychological evaluation and a bilingual educational evaluation in May 2016 as part of a "comprehensive multidisciplinary team assessment" for the purpose of "determining [the student's] developmental status and consequent eligibility for CPSE therapeutic services" (Dist. Ex. 5 at p. 1; see Dist. Exs. 5; 6).²

In September 2016 (at age three) the student began attending the Association for Metroarea Autistic Children (AMAC); he remained there for the 2016-17 school year (Tr. pp. 155-57).³

The parent obtained a letter from a doctor, dated May 18, 2017, which indicated that the doctor met with the student "for evaluation of his development" and recommended the provision of home-based ABA services, OT, and speech-language therapy (Parent Ex. D at p. 1).

The parent obtained a letter from another doctor, dated July 10, 2017, which indicated that the student had been under the doctor's care since he appeared for a neurological evaluation on November 22, 2016, and "based on medical observation" indicated the student required 20 hours per week of home-based ABA services, as well as one hour per day each of OT, PT, and speech-language therapy (Parent Ex. C).

A CPSE convened on July 12, 2017 and found the student eligible for special education as a preschool student with a disability (Dist. Ex. 1 at p. 1).⁴ The CPSE recommended that the student be placed in an approved nonpublic school and receive instruction in a 6:1+3 special class along with related services of five 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and three 30-minute sessions of individual PT per week (id. at pp. 1, 21, 24). The CPSE also recommended that the parent receive one, 60-minute session of parent counseling and training per month in a group setting (id.). The CPSE considered placing the student in a 12:1+2 special class; however, this was rejected due to the student having "greater delays than c[ould] be adequately addressed in a less restrictive educational environment" (id. at p. 1). The IEP also included hand written notes indicating the parent raised

¹ The parent testified that the student received 30 hours of home-based ABA services per week between September 29, 2015 and August 31, 2016 (Tr. pp. 155). However, the district's May 2016 evaluation reports indicated that, at the time, the parent reported that the student received 20 hours of ABA services per week (Dist. Exs. 5 at p. 1; 6 at p. 1).

² The hearing record indicates that the parent spoke English and Russian and that the student's receptive language skills were stronger in Russian (Dist. Exs. 1 at p. 1; 3 at p. 1; 6 at p. 1).

³ AMAC is a nonpublic preschool which has been approved by the Commissioner of Education as a preschool with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The summary page of the July 2017 IEP indicated the July 2017 CPSE meeting was a reconvene, the purpose of which was to amend the student's IEP; however, the IEP also indicated that the meeting was an annual review to discuss the student's progress and recommended programs (Dist. Ex. 1 at pp. 1, 2). The hearing record does not include an IEP dated prior to July 12, 2017.

concerns regarding the student's development and motor skills, and further indicating the parent did "not see the progress the school has" (*id.* at pp. 5, 9).

At the start of the 2017-18 school year, the student continued to attend a 6:1+3 special class in a 12-month preschool program at AMAC (Dist. Exs. 1 at p. 3; 4; 7). While at AMAC, the student received related services of speech-language therapy, PT, OT, and his parent was recommended to receive parent counseling and training (*see* Tr. pp. 65-66; Dist. Ex. 4).

A. Due Process Complaint Notice

By due process complaint notice dated November 1, 2017, the parent requested an impartial hearing alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year due to its refusal to provide for home-based ABA services (Parent Ex. B at p. 3).⁵ The parent argued that the student could not make progress towards annual goals included in the student's July 2017 IEP without a recommendation for home-based ABA services, goals that the parent contends indicated the student was expected to generalize skills he was learning in school to the home environment (*id.*).⁶

To remedy the alleged denial of FAPE, the parent requested 20 hours of home-based ABA services per week for the remainder of the 2017-18 school year to be administered by a provider of the parent's choice at a rate not to exceed \$150 per hour. As additional relief, to remedy the failure to provide the student with those services from the beginning of the school year, the parent also requested compensatory services in the form of 20 hours per week of home-based ABA services for every week the student did not receive the services, totaling a minimum of 200 hours (10 weeks of missed instruction) (*id.*).

B. Subsequent Events

Subsequent to the filing of the parent's due process complaint notice, the CPSE reconvened on December 4, 2017 (Dist. Ex. 3 at p. 1).⁷ The CPSE continued to find the student eligible for special education as a preschool student with a disability (*id.*). The CPSE also reviewed the student's present levels of performance and modified and changed some of the student's annual goals (*compare* Dist. Ex. 1 at pp. 3-9, 11-19, *with* Dist. Ex. 3 at pp. 3-10, 12-19). The CPSE also changed the recommendation for a 6:1+3 special class, to an 8:1+2 special class (*compare* Dist.

⁵ State regulation requires that if a district has not provided a parent with prior written notice regarding the subject matter of the parent's due process complaint notice, the district "shall, within 10 days of receiving the complaint, send to the parent a response" (8 NYCRR 200.5[i][4]). The hearing record does not include a response from the district or copies of prior written notices regarding the subject matter of the due process complaint notice. The hearing record indicates that the district introduced two documents which were described as "Prior Written Notice" (Tr. P. 6); however, the documents are notifications of the CSE meetings (Dist. Exs. 9; 10).

⁶ Throughout the proceedings, both parties and the IHO have used the terms SEIT/ABA instruction, ABA instruction, ABA therapy, and ABA services interchangeably. For purposes of this decision, "ABA services" is used for ease of reference.

⁷ The parent was notified of the December 4, 2017 CPSE meeting by letter dated November 20, 2017, which indicated the meeting was a requested review (Dist. Ex. 10).

Ex. 1 at pp. 1, 21, with Dist. Ex. 3 at pp. 1, 20). The CPSE did not make any changes to the recommended related services (compare Dist. Ex. 1 at p. 1, 21, with Dist. Ex. 3 at p. 1, 20). The CPSE maintained its notation that it considered placing the student in a 12:1+2 special class, rejecting this placement because the student had greater delays than could be adequately addressed in a less restrictive environment (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 3 at p. 1).

In an amended due process complaint notice dated December 15, 2017, the parent reasserted that the district failed to offer the student a FAPE for the 2017-18 school year and that the student required home-based ABA services (Parent Ex. A). The parent added allegations that the December 2017 IEP failed to offer the student a FAPE because the CPSE removed several goals that were on the July 2017 IEP without proof that the student had achieved them, omitted all references to the student's development of skills "at home," and added new goals that were vague, non-specific, inadequate, and unmeasurable (id. at pp. 3, 4). The parent's request for home-based and compensatory ABA services remained unchanged (id. at p. 4).

C. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on May 4, 2018, which concluded on September 17, 2018 after five days of hearings (Tr. pp. 1-192). In a decision dated November 20, 2018, the IHO found that the district offered the student a FAPE for the 2017-18 school year (IHO Decision at p. 8). The IHO determined that the student's program recommendation was changed from a 6:1+3 special class to an 8:1+2 special class because of progress the student made in activities of daily living and that such change was agreed to by the parent (id. at pp. 6-7). The IHO further found that the student continued to make progress throughout the 2017-18 school year despite evidence that significant absences and tardiness, which the IHO attributed to the student's sleep habits and the parent removing the student from school for additional outside related services, negatively impacted his ability to make progress in school (id. at pp. 7-8).

The IHO further found that the hearing record did not support a conclusion that the student required home-based ABA services in order to receive a FAPE (IHO Decision at p. 8). The IHO determined that the July and December 2017 IEPs addressed the student's identified needs, and that the special education class placements and related services were appropriate and provided educational benefit (id.). The IHO further noted that the letter from the student's neurologist did not provide any evaluative information supporting the doctor's recommendation for home-based ABA services (id.). In particular, the IHO noted that, unlike the assessments conducted by the staff at AMAC which did not recommend home-based services, the doctor's letter did not indicate that she conducted her own evaluations or reviewed any evaluative data in making her recommendation (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2017-18 school year.^{8, 9} Specifically, the parent argues that the IHO failed to address the issue of whether the student required home-based ABA services to receive a FAPE. The parent also argues that the IHO failed to properly address the issue of whether the disputed goals inclusion of the words "at-home" required home-based services and the context of the December 2017 CPSE's removal and alteration of those goals that included the words "at home" after the parent filed the due process complaint notice. While the parent does not dispute that the student made progress at school, the parent asserts that the IHO erred by disregarding the parent's testimony concerning the student's functioning at home.

For relief the parent requests that an SRO find that the district failed to offer the student a FAPE for the 2017-18 school year and award the student 840 hours of compensatory home-based ABA services.

In an answer, the district generally responds to the parent's allegations with admissions and denials and argues in favor of the IHO's determinations that the district offered the student a FAPE for the 2017-18 school year. In a reply, the parent reiterates that the student was denied a FAPE for the 2017-18 school year and requests an award of compensatory services.

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.

⁸ There are several issues that were included in the due process complaint notice, which the IHO did not directly address, and the parent has not raised on appeal (see Parent Ex. A). For example, the amended due process complaint notice included claims regarding whether the goals contained in the December 2017 IEP were vague, inadequate, non-specific, and/or unmeasurable; the omission of goals related to transitioning between activities, labelling numbers, and completing structures tasks; and the student's lack of progress in relation to language, toileting, and self-regulation (id.). The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulation provides that a request for review or a cross-appeal "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate" the relief sought by the appealing party (8 NYCRR 279.4[a], [f]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Further, "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][4]). As these issues were asserted within the due process complaint notice, were not discussed by the IHO, and were not raised by the parent on appeal, these claims are deemed abandoned and will not be addressed herein (8 NYCRR 279.8[c][4]).

⁹ The parent has not challenged the recommended placement of an 8:1+2 special class and recommended related services at AMAC during the 2017-18 school year (see Parent Ex. A; Req. for Rev.).

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]).¹⁰

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. 2017-18 School Year

As indicated above in the procedural history, the district held two CPSE meetings with respect to the 2017-18 school year, in July and December 2017, and the parent's amended due process complaint notice and request for review include allegations regarding both meetings. Accordingly, the July 2017 and December 2017 CPSE meetings are addressed separately below.

1. July 12, 2017 IEP

The sufficiency or accuracy of the present levels of performance and individual needs section of the July 2017 IEP are not challenged by the parent, and therefore provide a starting point for describing the student's needs and whether the IEP included appropriate services to address those needs. Additionally, a review thereof facilitates the discussion of the issues raised by the parent—namely, whether the annual goals in the July 2017 IEP that originally contained the words "and at home" could be worked on without home-based services, whether a goal relating to parent counseling and training was appropriate, and whether the student required home-based ABA services in order to receive a FAPE.

¹⁰ 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).

a. Present Levels of Performance

The CPSE convened on July 12, 2017 when the student was not yet four years old and had been in a 6:1+3 special class at AMAC since September 2016 (Dist. Ex. 1 at pp. 1, 3).¹¹ Initially the IEP provided a brief overview of the student's learning style (id. at p. 3). According to the IEP, the student attended school irregularly; however, when present he was able to remain seated for circle time, music, and a computer session for about 15 minutes without prompts (id.). The IEP noted, the student generally learned different skills through a 1:1 instructional setting and the student needed "a great deal of teachers' vocal and physical prompts to acquire new skills in [] small group activities and require[d] repetitive practices to maintain mastered skills" (id.).

According to the present levels of performance, the student appeared to be in good physical health (Dist. Ex. 1 at p. 3). With regard to classroom activities of daily living [ADL] skills, the IEP indicated that the student could unpack his backpack and hang up his jacket with verbal prompts; he was learning to feed himself with a fork or spoon; he knew the lunchtime routine and could clean up his own garbage independently; and he could pull up his pants and wash his hands when given vocal prompts; however, he was not yet toilet trained (id.).

With regard to the student's language skills, the July 2017 IEP indicated that the student presented with moderate-severe delays in receptive, expressive, and pragmatic language skills (Dist. Ex. 1 at p. 4). The IEP described the student as non-verbal, with no real words and indicated that he engaged in non-contextual vocalizations and communicated through pointing, with occasional assistance (id. at p. 3). According to the IEP, the student was beginning to use more vocalizations and his receptive language was "strong," but answering social questions or using pragmatics was more difficult for him (id.). The IEP indicated that the student was working on increasing eye contact, responding to his name, and following one-step directions (id.). In addition, he required a lot of praise and reinforcers during structured activities (e.g., programs, structured play, and circle time) (Dist. Ex. 1 at p. 4).¹²

In terms of social development, the July 2017 IEP indicated that the student usually smiled when he arrived at school, and he increasingly paid attention to his peers sometimes imitating their behaviors, such as running after the teacher when he saw his classmates doing it (Dist. Ex. 1 at p. 5). The IEP stated that the student might choose to sit with his peers when playing in the toy area,

¹¹ July 2017 CPSE meeting attendees included the CPSE administrator/district representative, a special education teacher/related services provider, a speech-language therapist, a social worker, the AMAC preschool director, the parent, the student's aunt, and an interpreter (Dist. Ex. 1 at p. 25).

¹² The July 2017 IEP detailed the student's then-current therapeutic targets for speech-language therapy including identifying pictures of familiar objects, responding to yes/no questions (using head nod/PECS), following simple commands, performing simple gestures upon request (wave hello and goodbye), increasing receptive and expressive language skills (Dist. Ex. 1 at p. 4). Session targets included identifying and naming nouns from a variety of categories (e.g., body parts, clothing, animals, and transportation items) and increasing verbal output by approximating sounds and/or words upon request, given models (id.). In addition, the student worked on his social and pragmatic skills such as eye contact, turn taking skills, and playing cooperatively with others, using common toys and materials (id.).

was able to make eye contact with visual prompts, and practiced greetings by saying "hi/bye" to students and adults at school (id.).

With regard to physical development, the IEP noted that the student enjoyed the "movement room," where he tended to display a high frequency of running and jumping while using the equipment (Dist. Ex. 1 at p. 6). The student was able to alternate his feet when ascending and descending stairs and, the IEP indicated, the student would continue to learn appropriate walking up and down stairs with one hand holding the banister (id.). The student was also working on running appropriately with good hip, knee, and ankle flexion motion, as well as learning to catch a ball without physical assistance (id.).

The present levels of performance detailed the student's fine motor, visual motor/visual perceptual, neuromuscular, handwriting and graphomotor, ADL skills, and sensory processing and self-regulation skills (Dist. Ex. 1 at pp. 6-7). According to the IEP, the student continued to demonstrate mild delays in fine motor skills (id. at p. 6). Specifically, he presented with a weak, immature grasp, but displayed some improvements in demonstrating a more mature grasp during fine motor activities (id.). The student continued to work on refining his pincer grasp and was able to string large beads with minimal tactile and visual assistance (id.).

With regard to the student's visual motor/visual perceptual abilities, the IEP characterized the student's skills as "fair" and noted that he had very limited visual attention (Dist. Ex. 1 at p. 6). According to the IEP, the student continued to require moderate to maximum tactile assistance to grasp scissors; he was able to snip paper with scissors; however, he was not yet able to follow a line (id.).

With regard to his neuromuscular skills, the IEP stated that the student presented with mild weakness in his upper extremities, especially in his hands, as well as mild delays in endurance and range of motion (Dist. Ex. 1 at p. 6). According to the IEP, the student required moderate verbal and tactile reminders to remain in an upright seated posture, displaying trunk weakness (id.). He participated in gross motor activities to improve endurance and upper extremity strength, as well as coordination (id.).

The IEP noted that with regard to the student's handwriting and graphomotor skills, he did not yet present with a dominant hand (Dist. Ex. 1 at p. 6). The IEP indicated that the student was able to scribble independently, imitate vertical and horizontal lines and circles, and was beginning to attempt to trace large capital letters but required hand over hand assistance (id.).

With regard to the student's ADL skills, the July 2017 IEP indicated the student continued to require moderate to maximum assistance for all basic ADL tasks (Dist. Ex. 1 at p. 7). According to the IEP, the student wore pull ups throughout the day and continued to work on improving independence with toileting and required moderate assistance to wash and dry his hands (id.). The student was able to doff socks and shoes independently, don socks with moderate tactile assistance, and manipulate Velcro on shoes; however, he required maximum assistance to put shoes on his feet (id.). As noted in the IEP, the student continued to work on improving his independence during his morning routine when he got to school and was able to unzip and doff his coat to hang it in his cubby with moderate verbal, visual, and tactile assistance (id.). The student continued to work on manipulating utensils during meal times and continued to require a moderate hand over

hand assistance to scoop or stab food and bring (utensil) to his mouth but was able to finger feed independently (id.). The IEP noted that the student required supervision during meal times for safety, completion, and to remain seated (id.).

With regard to sensory processing and self-regulation skills, the July 2017 IEP indicated the student demonstrated difficulty organizing, processing, and regulating incoming sensory information (Dist. Ex. 1 at p. 7). He demonstrated sensory seeking and self-stimulating behaviors, as well as impulsivity and difficulty with visual attention (id.). According to the IEP, the student was unable to self-regulate or regulate emotions but was beginning to engage more with peers, teachers, and therapists (id.).

The July 2017 present levels of performance also included information specific to the student's locomotion, balance, jumping, and hopping, ability to negotiate stairs, object manipulation, and neuromuscular/orthopedic skills (Dist. Ex. 1 at pp. 7-8). The IEP noted that the student walked independently in the school environment with proper speed and could run with supervision at "fair minus" speed for a distance of 20-25 feet (id. at p. 7). However, he had poor body control and decreased safety awareness demonstrated by a tendency to trip over obstacles and he required one-hand support most of the time to keep himself focused on a task while maintaining proper gait pattern with good safety awareness (id.).

With regard to balance, the July 2017 IEP indicated the student had "fair" static standing balance and "fair minus" dynamic standing balance (Dist. Ex. 1 at p. 7). He could stand on soft unstable cushion foam with "few loss" of balance and presented with minimum difficulty when negotiating unstable surfaces such as walking uphill or downhill and on steps (made of foam) (id. at pp. 7-8). With regard to the student's jumping and hopping skills, the July 2017 IEP indicated the student demonstrated "fair minus" balance, strength, endurance, and coordination (id. at p. 8). The student presented with difficulty hopping in place and required moderate assistance from the therapist to keep his lower leg elevated and one-hand support for stability (id.).

With regard to stairs skills, the IEP indicated that the student could negotiate three standard flights of stairs with decreased speed (Dist. Ex. 1 at p. 8). The IEP noted that occasionally the student exhibited decreased safety awareness during stair negotiation by leaning on the rails or sliding his feet to the next step, requiring verbal and manual cues to improve his safety (id.).

With regard to object manipulation skills, the student demonstrated "fair minus" ball manipulation skills (Dist. Ex. 1 at p. 8). He displayed maximum to moderate difficulty throwing and catching a medium sized ball due to poor attention span and required hand over hand assistance to guide him through each step of the activity (id.). The student was able to kick a ball with either lower extremity for 4-5 feet with "fair" force and "fair minus" directionality and required moderate assistance to extend his leg (id.).

With regard to the student's neuromuscular/orthopedic skills, the July 2017 IEP indicated the student demonstrated over-all "fair" sitting and standing posture and his range of motion was within normal limits (Dist. Ex. 1 at p. 8). However, the student presented with low muscle tone, and decreased strength throughout his extremities and trunk muscles (id.). The student exhibited

slight toe walking during ambulation which tended to lead to poor balance with occasional falls (*id.*).¹³

b. Annual Goals

The parent asserts that two annual goals included in the July 2017 IEP contained language indicating that they were intended to address the student's skills within the home environment and that they could not be accomplished without home-based services (*see* Parent Exs. A at p. 3; B at p. 3). The specific annual goals the parent focuses on included the following language "[w]ithin 12 months, [the student] will improve sensory processing skills to interact effectively in classroom and at home" and "[w]ithin 12 months, [the student] will improve ADL skills for greater independence at home and in the classroom" [emphasis added] (Dist. Ex. 1 at p. 13; *see* Parent Exs. A at p. 3; B at p. 3). The parent also identifies a short-term objective related to an annual goal regarding the provision of parent counseling and training, which states that "[p]arent will be given the opportunity to understand strategies use[d] during speech, PT, and OT sessions and how to implement strategies across all environments" [emphasis added] (Dist. Ex. 1 at p. 20; *see* Parent Exs. A at p. 3; B at p. 3).

Initially, the short-term objective, which relates to the parent being given the opportunity to understand strategies used by the student's related services providers so that those strategies could be implemented "across all environments," does not require home-based ABA services in order to be implemented.¹⁴ Rather, the short-term objective relates specifically to the provision of parent counseling and training and the hearing record shows that the July 2017 CPSE recommended one 60-minute session of parent counseling and training per month for the parent (*see* Dist. Ex. 1 at pp. 20, 21). Parent counseling and training is a resource that is intended to address the parent's stated concern regarding support in the home environment. Specifically, State regulation requires that district's provide parents of students with autism and students placed in certain special classes with "parent counseling and training . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.6[h][8]; 200.13[d]). State regulation further defines parent counseling and training to mean "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program (8 NYCRR 200.1[kk]). Consistent with the description of parent counseling and training in State regulation, parent counseling and training as identified on the IEP was described as a discussion of strategies used in the classroom and during related services sessions, and how those strategies could be

¹³ The July 2017 IEP noted the student's PT sessions emphasized a variety of therapeutic activities, such as stretching, jumping, hopping, running, ball play, balance training and stairs (Dist. Ex. 1 at p. 8). The IEP indicated that the student also exhibited moderate distractibility, a short attention span, difficulties following complex commands, and decreased safety awareness, and that the student had missed many sessions due to his absences (*id.*). According to the IEP, the student's inability to safely and successfully complete functional mobility transitions, negotiate stairs and participate in age appropriate gross motor play would affect his participation in classroom activities, learning in a school environment, and his social peer interaction in the school setting through physical play (Dist. Ex. 1 at pp. 8-9).

¹⁴ The annual goal that included the short-term objective regarding parent counseling and training also contained another short-term objective regarding opportunities for the parent to meet with the student's teachers and providers to discuss strategies and how to support the student's educational needs (Dist. Ex. 1 at p. 20).

implemented across all environments (see Dist. Ex. 1 at p. 20). The district CPSE administrator also described parent counseling and training as a way parents could learn about what a student's providers were working on in school and how it might be reinforced at home (Tr. pp. 114-15).

The AMAC director confirmed that parent counseling and training was mandated on the student's IEP and also confirmed that AMAC provided parent counseling and training (Tr. p. 65; see Dist. Ex. 1 at p. 21). She noted that generally, the parent training sessions were very small and intimate and provided an opportunity for parents to address very specific skills and get feedback right away (Tr. p. 70). The parent testified that he attended parent training and counseling sessions "sometimes" but stopped because they offered "nothing new" in terms of assistance with ABA therapy or techniques that could be used at home (Tr. pp. 177-78).

With respect to the two annual goals the parent objects to, it is worth noting that the IEP included approximately 14 annual goals with approximately 45 associated short-term objectives, aligned to the student's needs (Dist. Ex. 1 at pp. 11-20). Two of the student's OT goals targeted his ability to improve sensory processing skills and ADL skills in the classroom and "at home" (id. at p. 13). The director of AMAC testified that first the occupational therapist would work on the skill during the "individual mandated session" and once mastered, the therapist would work with the home and classroom environment to generalize the mastered skill (Tr. pp. 51-52). She opined that the goals did not require services to be provided in the home (id.). The AMAC director acknowledged the importance of generalizing ADL skills to the home environment and reiterated that once a skill was mastered, "the classroom educational team w[ould] communicate with the home and share how a skill [wa]s being worked on and then families or the home environment w[ould] then use that information and practice it at home:" (Tr. pp. 52-54).¹⁵ In reviewing the topics presented in parent counseling and training during the 2017-18 school year—which included an introduction to autism and applied behavioral analysis, an overview of related services disciplines "and how to apply those services at home," sleep training, and the turning five process—the director opined that the related services session would have been beneficial to the student's family as the providers "shared what their discipline works on and t[ips] and tricks so to speak on how to incorporate skill building at home" (Tr. p. 66-69). The director opined that the related services session would have assisted with the IEP goal[s] that referenced generalization at home in that a related service provider would have explained and prompted the parent on how to incorporate the student's goals at home (Tr. pp. 69-70). Consistent with the short-term objective identifying that the parent would be provided opportunities to meet with the student's teachers and providers, the director testified that parents are given an opportunity to contact or have communication with the related service providers outside of the parent counseling and training sessions (Tr. p. 70).

The CPSE administrator was asked to explain how the July 2017 annual goal that targeted the student's ability "to improve sensory processing skills to interact effectively in [the] classroom and at home" would be implemented (Tr. p. 113; see Dist. Ex. 1 at p. 13). She reported that the occupational therapist would work on sensory skills or ADL skills at school, "[b]ut obviously we

¹⁵ The AMAC director defined generalization as the ability to "produce a skill among different instructors and/or caregivers in multiple settings and multiple exemplars" (Tr. pp. 92-93). She stated that the ability of a student with autism to generalize a skill to the home setting was "very student and family specific, and goal specific" (Tr. pp. 92, 93).

want the child to be able to generalize those skills and hopefully it would be seen by the family as well at home" (Tr. p. 113). She defined "generalize" as a student learning a task in one environment and then being able to transfer it to another environment adding that "when a child...masters a skill...it usually happens" (Tr. pp. 113-14). The CPSE administrator added that there were times when a parent might need to reinforce what was learned at school through parent counseling and training (Tr. pp. 114-15). She noted that a parent would be able to learn what was being worked on by the providers and teachers and could reinforce things at home (Tr. pp. 114-15). The CPSE administrator testified that this type of goal would be implemented in the school (Tr. p. 117).

Accordingly, while the two annual goals in question, related to improving the student's sensory processing and ADL skills, are both designed to measure the improvement of the student's skills in the classroom and "at home," the July 2017 IEP included a support in the form of parent counseling and training to assist in carrying out the "at home" portion of those goals (see Dist. Ex. 1 at p. 13, 20, 21). The annual goals, in themselves, did not require the addition of home-based ABA services to the IEP for the student to receive an educational benefit.

c. Home-Based ABA Services

Separate from the parent's claims in the due process complaint notice that the annual goals required the addition of home-based ABA services, the parent also requested home-based ABA services at the July 2017 CPSE meeting and the CPSE's decision not to provide such services is central to the parent's dispute.¹⁶

Although, the parent's challenges to the July 2017 IEP focus on the parent's view that the student required home-based ABA services, a brief description of the program recommended by the July 2017 CPSE is provided.

¹⁶ In the due process complaint notice, the parent asserted that the student required home-based ABA services for generalization (Parent Ex. B at p. 3). 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, e.g., 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]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 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]). While the Second Circuit has not specifically ruled on the issue of a district's obligations, or lack thereof, under the IDEA to provide for the generalization of skills outside of school as part of an educational program, in considering whether certain home-based services provided for the purpose of generalization should be funded by the district, the Second Circuit has held that "parents are not entitled to reimbursement for services provided in excess of a FAPE" (L.K., 674 Fed. App'x at 101). Based on the prevailing caselaw, and on the fact that the parent is not contending that the student was not making progress in the school environment, the parent's assertion that the student required home-based ABA services to allow the student to generalize skills learned at school to the home environment is without merit.

To address the student's cognitive, social-emotional, and management needs the July 2017 CPSE recommended that the student receive special education instruction in a 6:1+3 special class in an approved (non-public) school (Dist. Ex. 1 at p. 1, 21). The CPSE identified resources to assist the student with learning including a structured learning environment, consistent and clear expectations, visual supports, verbal prompting, modeling, redirection, scaffolding, and a consistent positive reinforcement schedule (id. at p. 10).

Additionally, although the parent has not challenged the efficacy of the goals and associated short-term objectives included in the July 2017 IEP that were worked on in school, a review of the annual goals and short-term objectives shows that they were aligned with the student's deficits. The July 2017 CPSE recommended annual goals that called for the student to correctly label pictures, follow two-step directions, follow a structured morning routine, transition quietly between activities, label numbers, and independently complete interlocking puzzles (id. at pp. 15-19). With respect to the student's communication needs, the July 2017 CPSE recommended that the student receive individual speech-language therapy five times per week for 30 minutes (id. at p. 1, 21). In addition, the CPSE developed annual goals that targeted the student's receptive language skills, such as responding to his name and identifying common objects; expressive language skills, including using speech and PECS to communicate and labeling common objects; and pragmatic language skills, such as establishing and maintaining eye contact and engaging in pretend play (id. at pp. 11-12). With respect to the student's fine motor and sensory deficits, the July 2017 CPSE recommended that the student receive individual OT three times per week for 30 minutes to target goals related to fine motor and visual motor skills, sensory processing, and ADL skills (id. at pp. 13-14). To address the student's gross motor weaknesses, the July 2017 CPSE recommended that the student receive individual PT three times per week for 30 minutes (id. at p. 1, 21). In addition, the CPSE recommended PT goals related to developing good trunk control, core strength, balance, locomotion, and age appropriate gross motor skills (id. at pp. 1, 14-15). The July 2017 CPSE also recommended parent counseling and training one time per month for 60 minutes in a group (id. at pp. 1, 21-22). In addition, the CPSE recommended special transportation service for the student, specified in the July 2017 IEP as "curb to curb" and 12-month services (id. at pp. 22, 24).¹⁷

Finally, the July 2017 IEP indicated in two places that the recommended program and related services would occur in "school" or in the "approved school" (see Parent Exs. A at p. 4; B at p. 3; 1 at pp. 1, 21). Testimony by the CPSE administrator indicated that at the time of the July 2017 CPSE meeting, all goals were reviewed and that neither staff nor the parent objected to the goals (Tr. p. 110). She further noted that the CPSE recommended parent counseling and training to assist the parent in reinforcing skills learned in school, in the home environment (Tr. pp. 104, 112-15, 118). The CPSE administrator indicated goals would be implemented in school (Tr. p. 117). Furthermore, testimony by the AMAC director, who is also a board certified behavior analyst, indicated the student received ABA services in school and benefitted from them (Tr. pp. 40-41, 74, 83, 85).

¹⁷ The July 2017 IEP recommended that the student receive the same special education program during July and August as recommended for the 10-month school year (Dist. Ex. 1 at p. 22).

In support of his request for home-based ABA services, the parent testified that he provided the July 12, 2017 CPSE with written recommendations for home-based ABA services from a doctor who the parent was "directed to go and see for an advice of insurance" and a neurologist who sees the student "from time to time" (Tr. pp. 168-69; see Parent Exs. C; D).

According to a letter addressed to the parent's insurance carrier, the student was evaluated by a medical doctor on May 8, 2017 (Parent Ex. D at p. 1).¹⁸ In the letter, the doctor noted the student's diagnosis, and stated that the student was "receiving the maximal services available at his school setting, but it is the consensus of the school staff and of his father, that [he] requires even further services at home" (Parent Ex. D).¹⁹ The doctor's diagnostic impression was that of ASD, severity level 3, requiring substantial support (id.). The doctor "strongly" recommended that the student receive home-based ABA, OT, and speech-language therapy services in addition to services the student received at school (id.). Based on a follow-up letter dated May 31, 2017, it appears that the May 18, 2017 letter was sent to the parent's insurance carrier as part of an application for ABA and related services (id. at p. 2).

In a letter dated July 10, 2017, addressed to "whom it may concern," a neurologist indicated that the student was under her care since he appeared for a neurological evaluation on November 22, 2016 (Parent Ex. C).²⁰ She wrote that the student displayed "evidence of indications of autism," and that based on her medical observation, the student required "additional assistance; one on one ABA services at home for 20 hours a week" and "one-hour of speech therapy, daily, one hour of Physical Therapy and one hour Occupational Therapy, daily" (id.). The neurologist also opined that the services, as described, were "medically necessary" (id.).²¹

In this case, neither doctor participated in the CPSE meeting, nor is there any indication in the hearing record that the parent provided any evaluation reports or the results of any testing or assessments conducted by the doctors to the district.

As the letters did not include any evaluative or clinical supporting evidence to explain the recommendation for inclusion of home-based ABA services in the student's program, it was reasonable for the CSPE not to include such a recommendation as a part of its educational programming. The CPSE administrator indicated that from an educational standpoint it did not appear that home services were necessary for the student because he was making progress in his

¹⁸ Although the May 2018 letter indicates that the doctor evaluated the student on May 8, 2017, the hearing record does not include an evaluation report, or the results of any testing performed by the doctor (see Parent Ex. D).

¹⁹ Contrary to the information contained in the May 18, 2017 letter, the director at AMAC testified that she did not advise the parent that the student required home-based services, and further, that she was not aware of any staff doing so either (Tr. p. 73).

²⁰ Although the letter references an evaluation, the hearing record does not include a copy of an evaluation report or the results of any testing conducted by the doctor (see Parent Ex. C).

²¹ Chapters 595 and 596 of the Laws of 2011 amended to require insurance coverage of services for the diagnosis and treatment of Autism Spectrum Disorders, including coverage for some ABA services, when they are determined "medically necessary" by a licensed physician or licensed psychologist (Ins. Law §§ 3216; 3221; 4303).

educational environment (Tr. pp. 147-48). While the CPSE had to consider the letters provided by the parent, the CPSE was not required to follow those recommendations in determining the student's educational programming (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. March 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 2013 WL 1187479, at *15 [S.D.N.Y. Mar. 21, 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583 at *6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567).

Overall, the hearing record supports the July 2017 CPSE's determination that the student did not require home-based ABA services. While the parent certainly has valid reasons for seeking home-based ABA services—as the student may have benefitted from them while receiving early intervention services and the student may have experienced some difficulty generalizing skills outside of the school environment—the parent does not challenge that the student made progress in school and the district is not required to design an educational program for the home-environment where the student is making progress in school (see, e.g., F.L., 2016 WL 3211969, at *11; L.K., 2016 WL 899321, at *8-*10).

2. December 2017 IEP

As stated above with respect to the July 2017 IEP, the parent did not challenge the adequacy or accuracy of the student's present levels of performance identified on the December 2017 IEP. Accordingly, in discussing the appropriateness of the December 2017 IEP, the analysis begins with a recitation of the student's present levels of performance as identified therein.

a. Present Levels of Performance

With regard to the student's present levels of educational performance, the description of the student's strengths and needs in the December 2017 IEP was largely the same as the description found in the July 2017 IEP (compare Dist. Ex. 1 at pp. 3-11 and Dist. Ex. 3 at pp. 3-10).²² However, as discussed below, the CSPE made minor revisions to the student's present levels of performance and modified the student's annual goals.

With respect to the student's ADL skills, while the July 2017 IEP indicated the student was "not toilet trained yet," the December 2017 IEP indicated that the student was; however, the IEP also noted that the student "[wa]s currently working on a toilet training program but [wa]s not

²² A comparison of the July 2017 and the December 2017 IEPs indicates that portions of the information included in the July 2017 IEP were "whited out" on the December 2017 IEP (compare Dist. Exs. 1 at pp. 8-9 with Dist. Ex. 3 at pp. 5, 7-10). Testimony by the CPSE administrator verified she whited out portions of the content from the July 2017 IEP when writing up the December 2017 IEP draft (Tr. p. 137). The CPSE administrator did not recall the language she whited out but indicated that it would have been something that she felt would not have been appropriate at the time, as it was no longer a concern (Tr. pp. 137-38). She did not know if the parent reviewed the draft of the December 2017 IEP before or after she whited out the information (id.). The parent objects to the district whiting out portions of the IEP but has not identified any concerns regarding information that was not included in the December 2017 IEP.

consistent at school" (compare Dist. Ex. 3 at p. 3 with Dist. Ex. 2 at p. 1).²³ In addition, the December 2017 IEP indicated that the student was beginning to show discomfort when wet, while the July 2017 IEP made no note of the student showing any reaction when wet (Dist. Ex. 3 at p. 3).

The December 2017 IEP indicated that the student was able to identify and point to some colors including red, blue, yellow and green, whereas in July 2017 the student was only able to identify and point to red and blue (compare Dist. Ex. 1 at p. 4 with Dist. Ex. 3 at p. 4). The December 2017 IEP also indicated that the student loved playing with cars and other transportation items such as the bus, airplane, train, and truck, and followed directions for making the car go "up and down" the toy garage ramp, and for putting the items on the board bus with 100 percent accuracy (wheels, horn, door, windows, wipers, and driver) (Dist. Ex. 3 at p. 4). Of note, there is no mention of the student's ability to demonstrate this skill in the July 2017 IEP (see Dist. Exs. 1; 2). With respect to the student's pragmatic language skills, the December 2017 IEP indicated that the student showed a "little" response to his name and waved "hello" sometimes (Dist. Ex. 3 at p. 4).

The December 2017 IEP indicated that the student had been working toward his speech-language goals and stated that the student had made "steady progress" in the areas of responding to his name with eye contact and using PECS step I to communicate his wants and needs and to request items (Dist. Ex. 3 at p. 5). However, the IEP noted that the student still required significant prompting and modeling to say "CV [consonant-vowel] sounds such as /ma/ and /ba/ even though he [wa]s babbling consistently" (id.).

With respect to the student's needs related to the provision of OT, the December 2017 IEP indicated the student demonstrated small gains in the area of fine motor skills (Dist. Ex. 3 at p. 6). The December 2017 IEP noted he could "complete a simple 12-piece non-interlocking puzzle with moderate tactile assistance for correct completion and to grasp knobs of puzzle pieces" (the July IEP indicated he was working on a 10-piece non-interlocking puzzle) (Dist. Exs. 1 at p. 6; 3 at pp. 6-7).²⁴ In addition, the December 2017 IEP noted that during first quarter of the 2017-18 school year the student made some progress toward his self-care/ADL goals, and was able to zip and unzip once the zipper was on the track, with minimal support (Dist. Ex. 3 at pp. 7-8).

²³ The information included in the December 2017 IEP appears to come from an October 2017 educational progress report which indicated the student was "toilet trained" and was "working on a toilet training program but was not consistent at school" [Dist. Ex. 4 at p. 1]. Based on the report, it may be inferred that the student had made some progress in his toilet training but that the teacher who evaluated the student in October 2017 made a typographic error in indicating that the student was toilet trained. The parent noted that the student demonstrated some progress in toileting by the end of summer 2018 (Tr. pp. 172-73).

²⁴ While the December 2017 IEP noted that the student made small gains in school in the area of fine motor skills, it also contained statements that were in contrast with this conclusion. For example, the July 2017 IEP indicated the student demonstrated mild delays in fine motor skills, but the December 2017 IEP indicated he demonstrated moderate delays in his fine motor skills (compare Dist. Ex. 1 at p. 6, with Dist. Ex. 3 at p. 6). Similarly, the IEPs reflect that in July 2017 the student was able to string large beads with minimal tactile and visual assistance, while in December 2017 the student was able to string large beads with moderate assistance (compare Dist. Ex. 3 at p. 6, with Dist. Ex. 1 at p. 6).

With regard to PT, the present levels of performance were primarily the same in both IEPs. The December 2017 IEP indicated that student was able to kick a ball with fair force and directionality in eight out of 10 trials, as compared to five out of 10 trials noted in the July 2017 IEP (compare Dist. Ex. 1 at p. 8 with Dist. Ex. 3 at p. 9).

b. Annual Goals and Home-Based ABA Services

The parent asserts that changes in the annual goals, specifically removing annual goals containing the "at home" language, rendered the December 2017 IEP inappropriate and continued to assert that the student required home-based services in order to receive a FAPE as of the December 2017 CPSE meeting.

According to the AMAC director, the student demonstrated progress in socialization and the ability to follow the classroom routine, which prompted AMAC to contact the family and CPSE to set up a new meeting (Tr. pp. 55-56). The CPSE reconvened on December 4, 2017 for a requested/annual review to discuss the student's progress and recommend services and programs through the CPSE (Dist. Ex. 3 at pp. 1-2).

Initially, to the extent that the parent continues to assert that the student required home-based services for the purpose of generalization, as set forth above, planning for generalization of skills to the home-environment is not an IDEA requirement when the student is making progress in school and, as noted in the December 2017 IEP present levels of performance, the student continued to show progress in school. Additionally, as noted above, the parent does not challenge, and in fact, agrees that the student had made progress while at AMAC (Req. for Rev. at ¶ 24). As such, the parent's request for home-based services for the purpose of generalization to the home-environment is not further discussed.

The December 2017 CPSE recommended a change in the student's special class ratio from 6:1+3 to 8:1+2 because according to the AMAC director, data collected by AMAC showed that the student was becoming more communicative and socially aware and the school wanted the student "to be placed in a more functional grouping of students, so that he would have better peer models" (Tr. p. 58). The parent testified that although he expressed concerns about the student's progress at the December 2017 CPSE meeting, he agreed to the change in the student's placement to an 8:1+2 class because he believed the student would benefit from that change (Tr. p. 170-71).

The December 2017 recommended that the student's related services continue at the same frequency and duration as in his July 2017 IEP and recommended the same resources to address the student's management needs (compare Dist. Ex. 3 at pp. 1, 11, 20, with Dist. Ex. 1 at pp. 1, 10, 21). The student's speech-language goals remained the same; however, the corresponding objectives were modified (compare Dist. Ex. 3 at pp. 12-13, with Dist. Ex. 1 at pp. 11-12). Added objectives targeted the student's ability to recognize present progressive verbs, imitate CV sounds, and play cooperatively with others (Dist. Ex. 3 at p. 13). The student's OT goals were modified in that the words "at home" were removed from the goal related to improving sensory processing skills (compare Dist. Ex. 3 at p. 14, with Dist. Ex. 1 at p. 13). In addition, the goal that called for the student to demonstrate improved ADL skills for greater independence at home and in the classroom was changed to a goal that targeted the student's ability to demonstrate age appropriate dressing and toileting skills (compare Dist. Ex. 3 at p. 14, with Dist. Ex. 1 at p. 13). A PT goal

that addressed the student's lower extremity strength and postural control as it related to stair negotiation skills was added to the December 2017 IEP (Dist. Ex. 3 at p. 16). Goals related to labeling numbers, transitioning, and following the morning routine were removed from the student's December 2017 IEP (compare Dist. Ex. 3, with Dist. Ex. 1 at pp. 17-18). The December 2017 CPSE continued to recommend the student for 12-month services and special transportation services (Dist. Ex. 3 at pp. 21, 23).

Overall, a review of the student's annual goals reflected that they addressed the student's needs as identified in the present levels of performance (see Dist. Ex. 3 at pp. 3-10) and that the removal of the annual goals indicating the student would improve sensory processing and ADL skills in the classroom and "at home" was not a change that resulted in an IEP that did not offer the student an educational benefit.

VII. Conclusion

Based on the foregoing, the July and December 2017 IEPs did not fail to offer the student a program and placement that was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances for the reasons raised by the parent in the due process complaint notice and request for review (Andrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]).

THE APPEAL IS DISMISSED.

Dated: Albany, New York
April 1, 2019

STEVEN KROLAK
STATE REVIEW OFFICER