



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-002

**Application of a STUDENT WITH A DISABILITY, by his parents, 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:**

Arthur John Golder III, Esq., attorney for petitioners.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Churchill School and Center (Churchill) for the 2018-19 school year. 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 first received a diagnosis of a speech disorder in 2015 at the age of two and subsequently began receiving speech-language therapy (Tr. p. 510; Parent Ex. G at p. 1). According to his parents, the student attended the Village Preschool in 2016-17 school year (Parent Ex. C at p. 2).

On January 17, 2017 a Committee on Preschool Special Education (CPSE) convened for an initial review to determine whether the student was eligible for services as a preschool student with a disability (Parent Ex. B at pp. 1-2). According to evaluation results identified in the resultant IEP, at that time the student's overall performance on cognitive testing was in the high average range and he presented with moderate-severe articulation delays and mild delays in expressive

language skills (*id.* at pp. 3-4). The IEP also indicated that the student's social skills fell in the adequate range for his age; however, he required significant support to remain engaged, and he exhibited delays in sensory integration skills and fine motor development (*id.* at pp. 4-5). Finding that the student was eligible for special education as a preschool student with a disability, the January 2017 CSE recommended several management strategies, and annual goals and short-term objectives to improve the student's articulation, expressive language, sensory integration, fine motor/visual perceptual, peer interaction, and coping skills (*id.* at pp. 6-10). To address the student's needs, the January 2017 CSE recommended that the student receive two 45-minute sessions per week of individual speech-language therapy, two 45-minute sessions per week of individual occupational therapy (OT), and two 45-minute sessions per week of counseling in a group (*id.* at p. 11).<sup>1</sup>

In September 2017 the student began attending the district's full-day general education pre-kindergarten program and received in-school related services of speech-language, OT and counseling as recommended on the January 2017 IEP (Tr. pp. 72, 340-41, 347, 510; *compare* Dist. Exs. 2 at p. 1; 3 at p. 1; 15 at p. 1, *with* Parent Ex. B at p. 11). During the 2017-18 school year the parents also privately obtained speech-language therapy and OT services for the student (Tr. p. 514; *see* Parent Ex. E; Dist. Ex. 16).

In preparation for 2018-19 school year and the student's upcoming eligibility determination for special education and related services under a school-age IEP, the district obtained a social history update from the parents and in January and February 2018, prepared a speech-language progress report, a counseling progress report and a teacher report, and conducted a preschool evaluation scale (PES) as well as a classroom observation of the student (Dist. Exs. 2-6; 8).<sup>2</sup>

The parents also obtained a private neuropsychological evaluation from a clinical psychologist that was conducted over three dates in February 2018 to determine the student's cognitive, academic, social/emotional, and neuropsychological strengths and weaknesses, and to provide recommendations for the student's transition to kindergarten in fall of 2018 (Parent Ex. G at pp. 1, 16). At the conclusion of the evaluation, the private neuropsychologist reported that the student's cognitive potential fell within the very high range, his academic skills fell between the average to very high ranges, and he exhibited variability in his performance on language tasks, "with significant strength found generally in his language comprehension and pragmatic abilities, but weaknesses in his expressive skills, specifically on those tasks that examined expressive vocabulary, syntax construction, and sentence repetition" (*id.* at pp. 12-13). The report also reflected the private neuropsychologist's finding that the student demonstrated "significant and

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<sup>1</sup> On July 18, 2017, a CPSE reconvened to consider the student's eligibility for a 12-month program of related services for July and August 2017 (Parent Ex. D at p. 1). The CPSE determined that the student "required related services to support his ability to communicate and socialize in the classroom environment" and noted that the student had shown "significant regression with sensory and phonological processes" (*id.*). Therefore, the CPSE modified the student's IEP to recommend that the student receive two 45-minute sessions per week of individual speech-language therapy and two 45-minute sessions per week of individual OT for summer 2017 (*id.* at pp. 1, 14).

<sup>2</sup> The hearing record frequently refers to the student's initial CSE meeting to develop his first school-age IEP as a "Turning-5 meeting" (*see, e.g.* Tr. pp. 71, 309, 353, 533; Parent Ex. E at p. 1; Dist. Exs. 4 at p. 1; 22).

pervasive difficulties with language clarity and articulation," and that his "attention and executive functioning skills varied" with weaknesses in working memory noted (*id.* at p. 13). The private neuropsychologist recommended, among other things, that for fall 2018 the student "transition to a placement within a small (i.e., student-to-teacher ratio), structured and supportive classroom setting that [was] housed within a small, nurturing school environment," speech-language therapy using the PROMPT method to address articulation and oral-motor weaknesses, continued OT services, and services on a 12-month basis (*id.* at p. 14).<sup>3</sup> The parent indicated that after the neuropsychological evaluation she learned of Churchill "in the beginning of 2018" (Tr. p. 569).

By letter dated April 11, 2018, the parents received notification from Churchill that the student was offered admission to its elementary school for the 2018-19 school year and the parents each signed an enrollment contract on April 13 and 15, 2018 (Parent Exs. I; J at p. 2). In an email later that month, the parent provided the district with the names of the student's private speech-language pathologist, occupational therapist, and the private neuropsychologist, noting that "[a]ll three will participate via phone" in the upcoming CSE meeting (Parent Ex. K). Prior to the CSE meeting, the parents also provided the district with reports from the student's private related services evaluators and providers including January 17, 2018 and January 31, 2018 speech-language evaluation reports, a February 2018 OT progress report, the March 2018 neuropsychological evaluation report, and an April 2018 speech therapy summary report, as well as the Churchill acceptance letter (Tr. pp. 522-25; Dist. Exs. 9; 10; 16; Parent Exs. E; G; I).

On April 12, 2018, the district school psychologist prepared a classroom observation report of the student and his pre-kindergarten teacher prepared an updated progress report dated April 24, 2018 (Dist. Exs. 13; 15). These reports provided information about the student's social skills, reading and mathematics performance, and level of support he required in the classroom (Dist. Exs. 13; 15 at pp. 1-2). The school psychologist concluded that the student "appeared to be a typically functioning five year old boy, socially, physically and verbally during the observed activity" (Dist. Ex. 13 at p. 2). According to the teacher's report, the student was an "energetic, friendly, and sociable child," who continued to "make consistent progress," communicated his "wants and needs independently," and who was "thriving in his current classroom environment" (Dist. Ex. 15 at pp. 1-2).

A CSE convened on April 25, 2018 to determine whether the student was eligible for school-age special education and related services under the IDEA and, if so, to develop an IEP for the 2018-19 school year (Dist. Exs. 18 at p. 12; 20 at p. 2). Finding the student was eligible for special education as a student with a speech or language impairment the April 2018 CSE recommended seven annual goals to address the student's speech-language, motor, and social/emotional needs (Dist. Ex. 18 at pp. 7-9). The CSE determined that the student needed encouragement when he became frustrated, which sometimes occurred when he was not understood, as well as support for speech-language and "OT adaptations such as a pencil grip" (*id.* at p. 6). For the 10-month 2018-19 school year, the CSE recommended that the student receive two 30-minute sessions per week of speech-language therapy in a group of three, one 30-minute session of OT in a group of two, and one 30-minute session of counseling in a group (*id.* at p. 9).

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<sup>3</sup> The hearing record defines the PROMPT method as "Prompts for restructuring oral muscular phonetic targets" (Dist. Ex. 16 at p. 1).

Although the CSE discussed and considered integrated co-teaching (ICT) services and a New York State approved nonpublic school-day program, the final recommendation at that time was that the student attend general education classroom with the support of related services (id. at pp. 12-13; see Dist. Ex. 20 at pp. 5-6).<sup>4, 5</sup>

An April 27, 2018 prior written notice informed the parents of the district's placement recommendation for the student for the 2018-19 school year in a 10-month program at a district non-specialized class with group related services of OT, speech-language, and counseling (Dist. Ex. 19 at p. 1).

By letter dated June 19, 2018 the parents informed the district that they believed the program and placement the April 2018 CSE recommended was "wholly inappropriate" and requested that the district increase the student's speech-language therapy recommendation to "at least" three sessions per week on a 12 month basis (Parent Ex. O at p. 3). The parents also requested that the student "be placed in a smaller and more supportive classroom environment as suggested by the 2018 neuropsychological evaluation" (id.). The parents informed the district that if the district failed to implement the requested services and supports for the student, they intended to enroll the student at Churchill in September 2018 and "seek reimbursement for the costs related to tuition and needed related services over the summer" (id.).

#### **A. Due Process Complaint Notices**

In an amended due process complaint notice dated October 2, 2018, the parents alleged that the district failed to offer the student a FAPE during the 2018-19 school year (Parent Ex. C at p. 2).<sup>6</sup> The parents asserted that the IEP developed for the student at the April 25, 2018 CSE meeting was predetermined in that the CSE ignored evaluative information presented by a private neuropsychologist, the consensus of evaluators was rejected by the CSE, and the full continuum of services was not considered (id. at pp. 3-5). The parents also alleged that the CSE failed to meaningfully include the parents in the IEP development and placement process (id. at p. 6). Concerning the recommended program itself, the parents alleged that the placement in a general education classroom was not aligned with the opinions of private professionals that knew the student and would not offer adequate or appropriate instruction, supports, supervision, or services to meet the student's needs (id. at pp. 5-7). The parents asserted that the student required a smaller student-teacher ratio where there would be greater opportunity for the "intensive 1:1 related services and instruction" that the student required to address his speech and language and other educational needs (id.). The parents contended that the student required more intensive related

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<sup>4</sup> Due to the parents' concern regarding the recommendation for a general education program the school psychologist, who also acted as the district representative at the meeting, suggested an ICT "class," which "could provide a small student/teacher ratio" while allowing access to a general education curriculum and typically developing students (Dist. Ex. 18 at p. 13). The parents indicated they would consider ICT services and were informed that if they agreed to accept the ICT recommendation the CSE would reconvene (id.).

<sup>5</sup> Following the parents' request, the April 25, 2018 IEP was reissued with the addition of special transportation accommodations/services of limited travel time not more than 60 minutes (Dist. Ex. 22; Parent Ex. N; compare Dist. Ex. 18 at p. 12, with Dist. Ex. 23 at p. 12).

<sup>6</sup> The parents' original due process complaint notice was dated July 2, 2018 (Parent Ex. A).

services than those recommended in the April 2018 IEP and asserted that the IEP goals were poorly drafted, lacked sufficient progress monitoring, were generic and did not address all of the student's needs (*id.* at pp. 4-6).

The parents also asserted that the unilateral placement at Churchill was appropriate because it provided for the program and services recommended by the private neuropsychological evaluation, and that equitable considerations favored tuition reimbursement because the parents cooperated with the CSE and provided notice of their intention to unilaterally place the student at district expense (Parent Ex. C at p. 6). Among other relief, the parents requested an order directing the CSE to recommend an approved non-public school, or tuition reimbursement and/or direct funding of the unilateral placement at Churchill (*id.* at p. 7).

## **B. Impartial Hearing and Impartial Hearing Officer Decisions**

The parent's original due process complaint notice requested pendency in the form of related services consisting of speech-language therapy, OT and counseling on a 12-month basis pursuant to the "last unchallenged IEP dated January 17, 2017" (Parent Ex. A at pp. 7-8). The parties convened a hearing to address pendency on August 2, 2018, after which the IHO issued an interim decision on pendency dated August 16, 2018 (Tr. pp. 1-8; IHO Interim Decision; Parent Ex. A at pp. 7-8). The IHO's interim decision regarding pendency is not at issue in this appeal.

The parties convened again for a prehearing conference on August 29, 2018, and discussed the status of the matter (Tr. pp. 9-15). At the following hearing date, on December 7, 2018, the parties conducted another prehearing conference and discussed the fact that the due process complaint notice had been amended, that there had been a partial resolution of the matter, and that there would be "another IEP conference, at which time there's a good possibility to the matter could be fully resolved" (Tr. pp. 16-21; Parent Ex. C). On the next hearing date, conducted on January 4, 2019, the IHO summarized an off-the-record discussion between the parties, stating that "this matter is one where the parties were attempting to resolve the issues without need to litigate, and apparently, just to get to the bottom line, as the way it now stands it does look like we need to litigate" and thereafter scheduling and witness matters were discussed (Tr. pp. 21-28).

The impartial hearing was reconvened on March 29, 2019, and the hearing was concluded on August 13, 2019 after a total of eight hearing dates (Tr. pp. 1-579). In a final decision dated November 25, 2019, the IHO determined that the district had offered the student a FAPE during the 2018-19 school year and denied the parents' requested relief (IHO Decision at pp. 12-15). Although the IHO did not make discreet findings on some of the parents' claims, he determined that the April 2018 IEP was reasonably calculated to address the student's needs and he noted that the private neuropsychological evaluation and observation had identified problems that "do not seem all that serious" such as to require placement in a nonpublic school, and that "the neuropsychological in fact, it appears to me, supports the view as seen by the teacher; i.e., [the student] was a typically developing preschooler" (*id.* at p. 13). The IHO found that "the IEP team considered the neuropsychologist's findings but did not agree with the conclusions," and that one could review the same findings as the neuropsychologist and reach different conclusions (*id.* at p. 14). He pointed to a difference of opinion in the hearing record and noted that the neuropsychologist opined that a nonpublic school placement was required, while the CSE's recommendation of a general education placement with related services was supported by the

views of the preschool teachers and providers who had "actual experience working" with student prior to the development of the April 2018 IEP (*id.* at p. 13). The IHO concluded that the neuropsychologist's report supported the viewpoint of the student's teacher (*id.*). While the parents asserted that the April 2018 IEP did not provide for appropriate related services, the IHO found that the district's providers who participated in the CSE had a basis for the services recommended in the IEP and the IHO concluded that he could "see why the IEP team thought that the related services being put into place were sufficient to address the needs" of the student (*id.* at pp. 5, 12, 14).

With respect to the parents' unilateral placement, the IHO concluded that "I see no reason to believe that the program at Churchill was not able to address [the student's] learning needs, and in fact the [district] does not argue against the appropriateness of this program" (IHO Decision at p. 14). The IHO concluded that because the district had recommended a program reasonably calculated to provide an educational benefit, it was not responsible to pay for the cost of the unilateral placement at Churchill (*id.* at pp. 14-15).

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

The parents appeal.<sup>7</sup> The parents contend that the IHO erred in failing to find that the April 25, 2018 CSE predetermined the student's program and placement and erred in failing to consider that claim or make a ruling. According to the parents, certain district personnel and hearing witnesses knew the student's related services were to be reduced before the meeting, that the IEP goals were drafted before the CSE meeting with a reduction in services in mind, and that the CSE meeting was rushed and perfunctory and that no one listened to the parents' views. The parents next contend that the IHO also erred in failing to make a ruling concerning the CSE's failure to include the parents' "outside speech expert and OT evaluator" in the CSE meeting after the parent's written request, which impaired the parents' right to participate and denied a FAPE (Req. for Rev. ¶¶ 9-12). Next, the parents assert that the IHO erred in failing to rule on the parents' allegation that the district failed to provide the parents with a copy of a district speech and language evaluation report, which impaired the parents' right to participate and denied a FAPE.

The parents also assert that IHO erred in finding that the April 25, 2018 IEP was appropriate for the student, and argue that the district had no support for the recommended program. They contend that the IHO erred in finding that results of the private neuropsychological evaluation did not identify serious needs and erred in failing to consider the testimony of the parents' "outside speech and OT providers" concerning the student's needs (Req. for Rev. ¶¶ 14-17). The parents also argue that the IHO did not discuss or consider important IEP content such as the present levels of performance section and IEP annual goals. The parents contend that the IHO misconstrued and misapplied the evidentiary standards and erred in applying the holding in A.M. v. New York City Dep't of Educ. (845 F. 3d 523, 544-5 [2d Cir. 2017]) because the weight of the parents' evaluations in the impartial hearing should have led the IHO to the conclusion that the April 2018 IEP did not offer the student a FAPE notwithstanding the district's evaluative

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<sup>7</sup> The parents' request for review dated January 5, 2020 was rejected by this SRO for failure to comply with practice regulations of Part 279 of State regulations, as noted in more detail below, and the following description of the parents' claims and arguments on appeal comes from the parents' amended request for review dated January 28, 2020.

information. The parents contend that the CSE erred in failing to follow the recommendations in the private evaluations for a special class placement with management needs, such as sensory tools, movement breaks and behavior supports that are not present in the IEP. The parents next assert that the district conducted no evaluations to support the reduction in related services in the April 2018 IEP with respect to the previous years' IEP, and that the evaluative information that was before the CSE supported continuing the mandated related services. Lastly with respect to the April 2018 IEP, the parents contend that the IEP present levels of performance and goals were inappropriate.

Next, the parents contend that the IHO failed to rule upon their claim that the district did not meet its burden of proof for the substantive adequacy of the IEP that resulted from the CSE's decision to reconvene on December 20, 2018, and that the district representative at the impartial hearing "opened the door" to this claim by asserting the appropriateness of that IEP during the district's opening statement.

The parents contend that the IHO decision is unclear with regard to whether or not the IHO determined that their unilateral placement of the student at Churchill during the 2018-19 school year was appropriate, and that the evidence shows Churchill was appropriate because it provided the small, structured, language-based special education with individualized multisensory instruction that was recommended by the private evaluators. The parents also assert that the IHO did not make findings with regard to equitable considerations, and assert that they favor reimbursement because the hearing record shows the parents cooperated with the CSE and were open to a public school placement, had an appropriate program been recommended.

In an answer, the district contends that the IHO correctly found that the district offered the student a FAPE during the 2018-19 school year.<sup>8</sup> The district contends that the April 2018 IEP was not predetermined because the parents and the parents' private neuropsychologist participated in the meeting, and the CSE reviewed the reports of the private speech-language and occupational therapy providers. Additionally, the district contends that it is permissible to draft IEP annual goals before the CSE meeting, and that the goals were fully discussed and developed at the CSE meeting. The district asserts that the recommended program was also not predetermined because there were three options along the continuum that were considered at the CSE meeting; a general education placement, placement in an ICT class, and placement in a non-public school special education program.

In response to the parents' claim that the IEP recommendations and the reduction of the related services was not supported by evaluative information because the CSE failed to follow the recommendation of the private neuropsychologist, the district asserts that the changes to the recommended related services were supported by evaluation results and other input at the CSE meeting, and that the CSE was permitted to consider information from the private evaluations, but was not bound to adopt the recommendations contained in those evaluation reports.

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<sup>8</sup> The district submitted an answer dated January 13, 2020, to the parents' non-compliant request for review, but were permitted to file an amended answer in response to the parents' amended request for review. The following description of the district's defenses and arguments on appeal are derived from the amended answer.

The district also contends that several of the parents' claims in their amended request for review were outside the scope of the impartial hearing and are not properly before the SRO on appeal. The district asserts that the parents' claim that the district impeded their participation by failing to provide a copy of a district speech-language therapy evaluation report prior to the April 2018 CSE meeting was not raised in either of the parents' due process complaint notices. The district also asserts that the parents' claims that the district impeded their participation by failing to include the private speech-language and occupational therapy providers at the CSE meeting were not raised in either due process complaint notice. The district also contends that the parents' claims concerning the December 2018 IEP were not raised in either due process complaint notice and the district did not "open the door" to claims that the December 2018 IEP was inadequate due to any passing references by its representative in the opening statement. The district also contends that the parents' claims in their amended request for review concerning the present levels of performance and the annual goals in the April 2018 IEP are not at issue in the appeal because they were not asserted in the parents' initial request for review and therefore could not be properly raised in the subsequent request for review.

The district does not bring arguments with respect to the appropriateness of the unilateral placement at Churchill, or equitable considerations, and requests that the IHO's decision be upheld.

In a reply, the parents assert that all of the issues that the district contends were not properly raised and therefore outside the scope of the impartial hearing were sufficiently set forth in the parents' due process complaint notices and, therefore, should be considered by the SRO on appeal.

## **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]).<sup>9</sup>

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Compliance with Practice Regulations**

The parents' initial request for review, dated January 5, 2020, was received by the Office of State Review on January 9, 2020. After reviewing the parents' submitted papers, it was determined that the filings failed to comply with practice regulations, which require "a clear concise statement of the issues presented for review and the grounds for reversal . . . with each issue numbered and set forth separately," among other things (see 8 NYCRR 279.8 [c][2]). The parents' submissions also failed to comply with the practice regulations, which require a request for review to "clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions and orders to which exceptions are taken or the refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer" (see 8 NYCRR 279.8[a]).

In a letter sent at my direction by the Office of State Review to parents' counsel dated January 15, 2020, the parents were informed that the filings dated January 5, 2020, would not be considered; however, the parents were given a limited opportunity to cure the defects in their submissions and serve and file a compliant amended request for review by January 29, 2020. More specifically, the parents were cautioned that although the subject matter of the proceeding remains consistent as the matter transitions from the initial due process hearing to State-level review, "an

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<sup>9</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

appeal of an IHO's decision should engage and challenge the IHO's determinations and reasoning rather than merely restate the claims that the parent asserted against the district." The January 15, 2020 letter provided instructions on how to submit a proper request for review, but cautioned that "[o]ut of fundamental fairness the amended request for review may specify the challenges to the IHO's decision and reasoning, but it shall not be exploited as an opportunity to expand into new subject areas that were not raised in the request for review or memorandum of law filed with this office on January 9, 2020."

The parents resubmitted a request for review on January 28, 2020, and the district submitted an answer to the new request for review within the appropriate timeline. These directives become relevant as further discussed below.

## **2. Scope of Review**

In this appeal, the district asserts that to the extent that the parents argue that the district impeded their participation by failing to provide a copy of a district speech-language therapy evaluation report prior to the April 2018 CSE meeting and by failing to have the private speech-language and occupational therapy providers attend the CSE meeting, such claims were not properly raised in the due process complaint notices and cannot be raised on appeal. On review, the parents did not make these specific allegations in their due process complaint notice or amended due process complaint notice and the IHO did not make rulings on the issues of predetermination and parent participation (see IHO Decision; Parent Exs. A; C).

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Although the parents included these related service report and provider claims in their post-hearing brief (IHO Ex. II at pp. 15, 17), the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice containing these claims (see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at \*13 [declining to address new claims first raised in the party's post hearing brief after a lengthy impartial hearing process][S.D.N.Y. Dec. 16, 2011]). Accordingly, I decline to review these issues for the first time on appeal. That said, there are claims concerning predetermination and parent participation that were alleged in the parents' amended due process complaint notice and carry through on appeal, and those claims are addressed below.

Relatedly, the district also contends that the parents' claim concerning the December 2018 IEP was not raised in either the due process complaint notice or amended due process complaint notice and the district did not "open the door" to this claim. The parents argue that the district did "open the door" to claims against the December 2018 IEP by asserting in its opening statement that the December 2018 IEP was appropriate (see Tr. pp. 57-60). I decline to address any issue with respect to the December 2018 IEP because there were no claims asserted concerning that IEP in the amended due process complaint notice, there was no testimony submitted with respect to that IEP, and the December 20, 2018 CSE meeting apparently occurred as the result of a partial

resolution of the disagreements between the parties (see Tr. pp. 16-19; Dist. Exs. 25-27).<sup>10</sup> The representatives brief mention of the December 2018 IEP in the opening statement without eliciting any evidence justifying that IEP in support of a substantive defense of the parent's claims in the due process complaint notice did not open the door to the issue (see B.M. v. New York City Dep't of Educ., 569 F. App'x 57, 59 [2d Cir. 2014]) Additionally, the April 2018 IEP was the operative IEP in effect when the parents rejected the district's recommended program and placed the student in Churchill for the 2018-19 school year.

The district also contends that the parents' claims concerning the present levels of performance, and the annual goals in the April 2018 IEP are not at issue in the appeal because they were not asserted in the parents' initial request for review and therefore could not be properly raised in the subsequent request for review. I agree that the present levels of performance and annual goals were not touched upon in that pleading, and having informed the parents—in the January 15, 2020 letter to parents' counsel providing the parents with additional time to file a request for review that complied with practice regulations—that the amended request for review may specify the challenges to the IHO's decision and reasoning, but it shall not be exploited as an opportunity to expand into new subject areas that were not raised in the initial request for review. The parents had nearly two years at the impartial hearing level to refine their claims and arguments and then were afforded a 40-day timeline under State regulations to describe their disagreements with the reasoning in the IHO's decision. For the reasons described above, their papers did not engage with the IHO's decision and they were given an limited opportunity to bring their papers into conformity with State regulations rather than face the more drastic sanction of outright dismissal. But now, by bringing more IEP issues, they press too far. Well within the stringent 30-day period that I am afforded under federal law to become familiar with the entire hearing record and reach a final decision in the complex issues in this proceeding that were mentioned in the first request for review, the parents argue that they should again be able to clarify and ask for additional fact finding regarding the April 2018 IEP to be decided which were not even mentioned in their first request before me. That is improper at this juncture. Accordingly, claims concerning the present levels of performance and the annual goals in the April 2018 IEP will not be further addressed herein.

### **B. April 2018 CSE – Predetermination**

Initially, some of the claims asserted by the parents cast as predetermination of the student's program by district members of the CSE or as an impediment to the parents' participation in the development of the student's program may be better viewed as substantive claims against the content of the April 2018 IEP itself. For example, the parents' assertion that the CSE failed to meaningfully consider the results of private evaluations and the recommendations of the private providers who worked with the student, instead recommending a predetermined "default general

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<sup>10</sup> To the extent that the December 2018 CSE meeting was conducted as a part of the resolution process, according to the IDEA, the "purpose of the [resolution] meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (20 U.S.C. § 1415 [f][1][B][i][IV]; 34 CFR 300.510 [a][2]; 8 NYCRR 200.5 [j][2][i]). As the purpose of the resolution process is to keep claims out of due process, it would be counterintuitive to permit the parents to raise allegations regarding the December 2018 CSE meeting in this proceeding simply because it was conducted as a part of the resolution process. However, subject to the appropriate limitations period, the parents are not precluded by any finding within this decision from bringing any claims concerning the December 20, 2018 IEP in a different proceeding.

education" program may be better considered as a substantive claim that the recommended general education program was inappropriate given the student's needs and abilities. That question is addressed at length below. The question of whether the CSE had the requisite "open mind" regarding the content of the student's IEP, and whether the parents were given a meaningful opportunity to participate in the development of the student's IEP, is discussed herein.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at \*8-\*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*10-\*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K., 12 F. Supp. 3d at 358-59 [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at \*5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at \*8, \*10; E.F., 2013 WL 4495676 at \*17 [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at \*7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S., 2011 WL 3919040, at \*11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate

in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Generally, a district is not required to consider placing a student in a nonpublic school if it believes that the student can be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in the IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at \*19-\*20 [S.D.N.Y. Sept. 16, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]).

According to the minutes taken at the April 25, 2018 CSE meeting, the CSE was composed of both of the student's parents, a district school psychologist who also served as the district representative, the student's classroom teacher, a district special education teacher, a district speech-language pathologist, a district occupational therapist, a district school counselor, a district school social worker, a district early grade social worker, and the parent's private neuropsychologist, who had conducted the March 2018 neuropsychological evaluation and attended by telephone (Dist. Exs. 18 at p. 13-15; 20 at p. 1; see Parent Ex. G).<sup>11</sup> The meeting minutes reflect that the private neuropsychologist reported the results of her evaluation verbally to the CSE in some detail, and explained her recommendation for a "small school setting," that an ICT program could be over-stimulating for the student, and noted that Churchill's class size was only 12 students per class and contained students who were speech impaired or had a "speech based" learning disability (Dist. Ex. 20 at pp. 1-2, 5). The meeting minutes also reflect input from the parents on a number of topics including their concern about the student's speech articulation, the student's struggles with communication, the student's need for more time working with a speech therapist, the student's need for movement breaks to aid in focus, and the student's propensity to shut down when faced with a perceived challenge (*id.* at pp. 2-6). The minutes indicate the CSE meeting began at "10:10" and ended at "11:50" (*id.* at p. 1).

The meeting minutes also reflect that the CSE as a group discussed the differences between the CPSE and the CSE, the student's disability classification, the student's frustration when he was not understood by peers, the student's speech-language therapy recommendation, and the IEP speech-language, counseling and OT goals (Dist. Ex. 20 at pp. 1-5). The students' speech-language

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<sup>11</sup> The minutes of the April 2018 CSE meeting were prepared by one of the district's social workers, and on appeal the parents do not contest that the minutes accurately reflect what occurred during the meeting (Dist. Ex. 20 at pp. 1-6).

pathologist, school counselor and occupational therapist at the student's public preschool program led discussions regarding the student's needs and recommendations with respect to speech-language therapy, OT and counseling respectively (*id.* at pp. 2-4).

Lastly, the CSE considered and discussed three possible placements; "general education, ICT or Churchill," during which the parents were asked if they had a preference, and they responded that they were "open to exploring" (Dist. Ex. 20 at pp. 5-6). According to the CSE meeting minutes, the parents did not "definitively" say which placement they wanted for the student (*id.*). The meeting minutes relate that the district representative did "not believe [the student] needs a small class at a special education school" and would not recommend a "private special education class" (*id.*). When asked to choose between a general education class with related services or an ICT class with related services, the parents did not respond (*id.*). The minutes relate that "[a]fter a silence the district representative said she looked carefully at everything and recommended general education class with related services" (*id.* at p. 6).

At the impartial hearing, the student's mother testified that she and her husband participated in the April 2018 CSE meeting in person and by asking questions and providing documents and evaluations to the CSE (Tr. pp. 521-22). The student's mother stated that the parents provided the CSE with a copy of the private neuropsychological report, three private speech-language evaluation reports and a private OT evaluation report (Tr. p. 522). The parent stated that during the CSE meeting, the private neuropsychologist was "cut very short" by the district representative in her description of the student's needs and that the private neuropsychologist did not have a fair opportunity to explain her findings (Tr. pp. 525-26). The parent stated that the meeting "moved really quickly. There was little time for open discussion. There was a system in place, and it went quick, like, a formula" (Tr. p. 528). The student's mother stated that during the CSE's discussion of the possibility of an ICT placement, the district representative brought up the idea of an ICT placement "as a compromise" (Tr. p. 531). Further, she testified that the district representative was "dismissive" of the idea of placing the student at Churchill because she felt it was not an appropriate setting for the student (Tr. pp. 531-32).

The student's mother also testified that she was told prior to the April 2018 CSE meeting "by all three therapists" that the "services would be reduced" (Tr. p. 533). For example, the district speech-language pathologist informed her that "she does not see children in kindergarten individually" and that the OT and counseling providers both told her that they intended to recommend a reduction in related services at the CSE meeting (Tr. pp. 533-34). The parent testified that she argued against reducing the student's related services mandates at the April 2018 CSE meeting, and expressed her concerns about the right level of supports in the classrooms, but ultimately felt that she and her husband were not "given an opportunity to have an open and honest dialogue, to build an IEP that was meaningful" for the student (Tr. pp 537-38).

At the impartial hearing, the private neuropsychologist also testified about the April 2018 CSE meeting, stating in part that she did not feel her "voice was heard" and felt rushed by the CSE process (Tr. pp. 211-14, 231-32). On cross examination at the impartial hearing, the private neuropsychologist further testified that she was present for the duration of the CSE meeting, that the parents were given an opportunity to speak but they "weren't really able to express their concerns" and that although no one at the CSE meeting told her to stop speaking, there was a "redirection towards what the team wanted to talk about" (Tr. pp. 260-62).

Also at the impartial hearing, the district school psychologist who participated in the April 2018 CSE meeting as the district representative discussed the meeting at length (Tr. pp. 68-70, 84-86, 86-96; Dist. Ex. 20 at p. 1). She stated that prior to the meeting she reviewed the evaluation reports and other material the parent had provided her, including the evaluation report of the private neuropsychologist, as well as other evaluative information from the student's providers and classroom teacher (Tr. pp. 73-79). She stated that the "school providers who were working with him" developed the IEP goals before the CSE meeting, and that "we go over the goals at the meeting. So the IEP is kind of a draft" (Tr. p. 87). She also stated that goals were created by the speech-language pathologist, occupational therapist, guidance counselor, teacher, the parent, herself, the private neuropsychologist, and the outside providers (Tr. p. 89). Although she could not recall if the particular goals in the IEP were the same ones that were in the draft, she did recall that "we had enough changes in the IEP that I couldn't give it to them that day. It was just a draft, and I had to go and fix everything up and change things around. So I sent it to [the parents] later." (Tr. pp. 87-88). She stated that counseling was included on the IEP to address the parents' stated concerns with respect to the student's social and emotional needs (Tr. pp. 90-91). She stated that OT was included in the IEP because the district occupational therapist was reluctant to recommend terminating the service even though she felt the student was "doing pretty well" (Tr. p. 91). The district representative also stated that speech-language therapy was included because "of most concern to everybody was the speech and language, although it was a much greater concern, in my understanding, to the parent" (*id.*). She also stated that the CSE addressed parent concerns by discussing them at the CSE meeting and confirmed that the suggestion of an ICT placement at the CSE meeting was a compromise between the parents' view of the student's needs and that of the district providers at the CSE meeting (Tr. pp. 92-95).

The district speech-language pathologist who was the student's provider during the 2017-18 school year and took part in the April 2018 CSE meeting also testified at the impartial hearing (Tr. pp. 277-78, 281, 302). She confirmed that prior to the April 2018 CSE meeting she told the student's mother that she intended to recommend a reduction in the student's mandated services (Tr. p. 330). She testified that she felt she was free to recommend whatever speech-language therapy services appropriate to meet a student's individual needs and was able to make a recommendation for therapy that was more than three sessions per week (Tr. pp. 310-11)

The district occupational therapist, who was the student's provider during the 2017-18 school year and took part in the April 2018 CSE meeting, also testified at the impartial hearing (Tr. pp. 333-336, 359). She testified that she felt she was free to recommend whatever OT services that were appropriate to meet a student's individual needs and was not aware of any specific policy with respect to the number of recommended sessions or their duration that she was allowed to recommend (Tr. pp. 371-72, 374-75, 398-99).

Considering the above, I note that there is information in the hearing record that the district personnel had pre-formed opinions about the best way to address the student's needs, which is permissible (*DiRocco*, 2013 WL 25959 at \*18) and there is some evidence pointing to the parents' ability to participate in the development of the student's IEP having been impeded, but not to an extent that I find significant within the meaning of the IDEA, by the particular processes the CSE engaged in while developing this student's IEP. This is because there is also evidence that the CSE continued to have the requisite "open mind" with respect to the contents of the student's IEP before and during its development, and discussed numerous options, and it does appear that the

parents were afforded a meaningful opportunity to present information and their views to the CSE and that the parents input was considered, albeit not agreed upon to their satisfaction. Accordingly, I find insufficient reason to overturn the IHO's finding that the district offered the student a FAPE during the 2018-19 school year on the asserted grounds.

### **C. April 2018 IEP**

The parents assert that the April 2018 IEP failed to appropriately address the student's educational needs in several ways. First, the parents assert that the recommended general education classroom placement insufficiently addressed the student's management needs and would not offer sufficient support for the student in order to make progress. The parents also assert that the student required more intensive related services, specifically more speech-language therapy and occupational therapy, than was called for in the April 2018 IEP. The district asserts that the IHO correctly found that the recommended general education placement, management needs and related services were appropriate and offered the student a FAPE for the 2018-19 school year.

#### **1. General Education Placement**

The hearing record reflects that the April 2018 CSE had available and discussed a significant amount of information about the student provided by district staff who worked with the student in his pre-kindergarten program during the 2017-18 school year as well as information provided by the student's private related service providers and evaluators. Specifically, the April 2018 CSE considered: the January 17, 2018 and January 31, 2018 private speech-language evaluation reports; the January 2018 counseling progress report; the February 2018 classroom observations; the February 2018 private OT progress report; the February 2018 teacher report; the February 2018 Preschool Evaluation Scale (PES) report; the social history update; the March 2018 private neuropsychological evaluation report; the March 2018 private speech-language progress report; the April 2018 classroom observation; the April 2018 teacher report; and then-current information provided by the district's speech-language pathologist (Dist. Exs. 18 at pp. 1-6; 19 at pp. 1-2; see Parent Exs. E; G; Dist. Exs. 2-6, 8-10, 13, 15-16, 20).<sup>12</sup> While it is evident that the April 2018 CSE considered an abundance of evaluative information, discussed in greater detail below, from both the student's district and private providers, there remained a lack of consensus regarding the student's abilities and needs relative to communication, fine motor development and behavioral presentation. Additionally, in areas where agreement existed regarding the student's needs, there were conflicting expert opinions about the severity of and how to address those needs in the educational setting. As a result, the parties remain in conflict with respect to what constitutes an appropriate program for the student. I am therefore not in agreement with the parents' assertion that there was a "consensus" among those who evaluated the student regarding his needs that should have been followed by the CSE (see A.M. v. New York City Dep't of Educ., 845 F.3d 523,

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<sup>12</sup> The April 2018 IEP reflects information consistent with the January 8, 2018 speech-language progress report and the undated social history update (compare Dist. Ex. 2, with Dist. Ex. 18 at pp. 1-2, 4). The April 27, 2018 prior written notice indicated that the CSE also reviewed and discussed an April 25, 2018 "Speech and Language Summary Report" that does not appear to be included as a document in the hearing record (Dist. Ex. 19 at p. 2). According to the CSE meeting minutes, the district speech-language pathologist wrote her April 2018 progress report "directly into the IEP" but indicated she would provide the parent with that information in a Word document (Dist. Ex. 20 at p. 6).

543–46 [2d Cir. 2017] [referencing and following the proposition that when the reports and evaluative materials present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits]). Rather, as discussed in detail below, the hearing record supports the IHO's finding that in light of the district's LRE obligation, the April 2018 IEP that recommended related services for the student in a general education classroom was reasonably calculated to enable the student to receive educational benefits (see IHO Decision at pp. 14-15).

#### **a. Cognitive, Academic, and Classroom Performance**

With respect to the student's cognitive functioning, the private neuropsychologist reported that she re-administered the Wechsler Preschool and Primary Scale of Intelligence, Fourth Edition (WPPSI-IV) to the student, which yielded a full-scale IQ of 124 (95th percentile, very high), noting that due to variability amongst different tasks, an analysis of the indices and specific subtests provided a more accurate picture of the student's cognitive functioning (Parent Ex. G at pp. 7, 17). The student's strongest performance was reported with respect to the fluid reasoning index (98th percentile, extremely high), with relative strengths noted in the visual spatial index (95th percentile, very high), verbal comprehension index (87th percentile, high average), and processing speed index (87th percentile, high average) (id.). According to the private neuropsychologist, the student demonstrated the weakest performance within the working memory index, which assessed the student's ability to concentrate, memorize, and manipulate new information (58th percentile, average) (id.). Despite the student's relatively strong performance on formal assessments in her report the private neuropsychologist expressed concerns regarding the student's relative weakness in working memory and expressive language, which qualified him for a diagnosis of language disorder (id. at pp. 12-13). The private neuropsychologist also presented concerns regarding the student's inattention and hyperactive/impulsive behavior, which she observed during testing and was reported by the parents (id. at p. 13). She concluded that the student was "at significant risk for developing a more formal attentional disorder" such as "ADHD," which was complicated by the student's communication difficulties that led to periods of distractibility and frustration (id.).

To assess his pre-academic skills, the private neuropsychologist administered subtests of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to the student (Parent Ex. G at p. 11). With respect to early reading skills that explored phonological processing ability, rhyming skills, and early sight word recognition, the student's performance fell in the average range (70th percentile) and he identified a number of letters and letter sounds and provided rhyming words, but demonstrated variable ability to separate phonemic components of words (id.). The student performed within an average range on an alphabet writing fluency task (61st percentile) and according to the private neuropsychologist, this relatively weaker performance suggested that the student had "difficulty with graphomotor fluency-oriented activities" (id.). Regarding mathematics skills the student performed in the very high range (95th percentile) on applied problem-solving tasks indicating well-developed counting and number sense as well as math reasoning skills, which the private neuropsychologist deemed to be areas of strength within the student's academic profile (id.). In her report, the private neuropsychologist indicated that the student's academic skills "generally exceeded current grade expectations," but cautioned that he exhibited relative weaknesses in early reading skills and writing fluency, such that he "will require

specific interventions within his educational setting, as well as a multi-sensory format of teaching" (id. at p. 13).

Turning to observations of the student's classroom performance, the March 2018 neuropsychological evaluation report detailed the private neuropsychologist's classroom observation conducted at the student's pre-kindergarten program (Parent Ex. G at p. 4). According to the report, the class was comprised of 17 student, one teacher, and one assistant (id.). During the one-hour observation the private neuropsychologist reported that the student generally remained focused on the lesson being presented, asked questions of his peers, appeared eager to participate, transitioned to an activity at the table and engaged in the activity (id.). The student socialized occasionally during the activity and appropriately received assistance from a peer when he had difficulty (id.). The report described the student's interactions with peers during unstructured time in library area, where—the private neuropsychologist opined the students had become overstimulated—some shoving occurred (id. at p. 5). However, the private neuropsychologist reported that "this behavior quickly subsided," and "no further issues occurred, and the group appeared to interact nicely" (id.). During "Choice Time" the private neuropsychologist reported that "a small altercation" occurred between the student and another student, noting that "it resolved very quickly" (id.). The student was also observed attempting to resolve a conflict between two other students and seeking out opportunities to interact with the group of peers (id.). The private neuropsychologist noted the student's mild articulation issues, and his frustration that occurred when peers did not follow play routines "exactly," however, the report reflected the teacher's description of the student as a "typically developing four-year old" who was "very motivated toward school, loved to participate and volunteer, and [was] generally very independent" (id.). The teacher further described the student as having a "bubbly personality" and indicated that he was "very outgoing" even with shy children (id.). The teacher indicated the student's vulnerabilities included articulation difficulties, increased frustration when trying to communicate something when others did not understand him, and a tendency toward perfectionism and shutting down when he was not understood (id.). The student's teacher also indicated that when the student "shut down" he responded to support and redirection and that staff were working with the student to better label his feelings (id.). In general, the teacher reported that she had observed "nice improvement over the year," and that his peers valued the student as an important member of the class (id.).<sup>13</sup>

On April 12, 2018 the district's school psychologist conducted a 30-minute classroom observation of the student while the class was engaged in "Choice Time," a group activity, and during transition to snack time (Dist. Exs. 13 at p. 1; 18 at p. 15). The school psychologist reported that the student independently followed teacher directives to clean up, interacted with peers appropriately during play, and followed classroom routines (Dist. Ex. 13 at p. 1). According to the report, the student volunteered to interview a peer, and was "in charge" of calling students by name to dispense hand sanitizer, which he did "essentially unsupervised" (id. at pp. 1-2). The

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<sup>13</sup> A district social worker conducted a classroom observation of the student at the same time as the private neuropsychologist's observation (Tr. pp. 141-42; Parent Ex. G at pp. 4-6; Dist. Exs. 6; 18 at p. 15). Review of the two observation reports shows that the information about the student's classroom performance and teacher report is generally consistent (compare Parent Ex. G at pp. 4-6, with Dist. Ex. 6).

school psychologist concluded that the student "appeared to be a typically functioning five-year old boy, socially, physically and verbally during the observed activity" (id. at p. 2).

Next, regarding teacher reports of the student's classroom performance, in February 2018 the school psychologist administered the PES to the student's teacher "to obtain quantifiable data in five major areas of functioning" (Dist. Ex. 5 at p. 1).<sup>14</sup> The teacher's ratings reflected the following subscale standard scores: large muscle skills (11), small muscle skills (10), cognitive thinking (10), expressive language skills (11), social/emotional (11), and self-help skills (6), resulting in a composite score of 99 (47th percentile, average) (id.). The school psychologist reported that the teacher "noted typical performance in all areas except Self-Help, which was delayed," but indicated that the teacher was "unable to answer four questions as she ha[d]n't seen the adaptive behaviors in the class so she did not know if [the student] could do them" (id. at p. 2).

Also, in February 2018 the student's teacher prepared a report of the student's behavior/social skills, attention and focus, academic functioning, and language skills (Dist. Ex. 8). With respect to behavior, the teacher reported that the student was well liked by the classroom community, he had positive relationships with peers and adults, and was outgoing, independent, and was able to enter different social circles, initiate conversation, share experiences, and turn to adults for support (id. at p. 1). Regarding attention/focus, the teacher indicated that the student was engaged throughout the day and often participated during classroom discussion, played well during choice time, engaged in play for a sustained amount of time, and completed tasks with minimal interruptions (id.). Although in the past the student was observed to "shut down when he felt unable to complete a task well," at the time of the report that behavior was a "rarity" and the student had "grown in his approach to learning" (id.). The teacher also noted that the student was able to manage delayed gratification and exhibit self-awareness but needed to continue to learn to communicate his feelings, especially related to frustration, and use an inside voice when excited (id.).

With respect to academic skills, the February 2018 teacher report indicated that the student enjoyed read-alouds, was engaged and participated in read-aloud discussions, made strong connections, enjoyed perusing books independently or with peers, and read a variety of texts for a variety of purposes (Dist. Ex. 8 at p. 2). The teacher did not report any weaknesses related to the student's reading skills (id.). In mathematics, the teacher reported that the student identified numbers one to ten, counted with one to one correspondence, and recognized most shapes (id.). Although characterized as "[n]ot so much an area of weakness," the teacher indicated that the student was working on slowing down when counting and double-checking his work (id.). In the area of writing, the teacher reported that initially the student had not appeared to enjoy illustrating, but that with encouragement and modeling, he illustrated and added detail with minimal teacher

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<sup>14</sup> The PES was also administered to the parent (Dist. Ex. 5 at p. 1). The parent's ratings were as follows: large muscle skills (6), small muscle skills (5), cognitive thinking (8), expressive language skills (3), social/emotional (2), and self-help skills (7), for a composite score of 76 (5th percentile) (Dist. Ex. 5 at p. 2). In the report the district school psychologist noted the discrepancy between the parent and teacher ratings, which she opined could have been due to variable behavior between the two settings or a difference in perception of the individual filling out the form (Dist. Ex. 5 at p. 2). She further noted that especially within the social/emotional and expressive language subscales some behaviors were rated "markedly different," for example, that the parent reported the student "cannot perform" tasks including maintaining self-control in group situations and naming pictures of ten common objects; tasks that the teacher indicated the student could perform "successfully and independently" (id.).

support (id.). She noted that the student was "working on strengthening his pencil grip which has improved a lot already" (id. at p. 3). Lastly, with respect to language the teacher report indicated that the student had "a very high vocabulary for his age" and that he was able to articulate his wants and needs independently (id.). The teacher reported that the student continued to work on his articulation skills and that at times it was difficult to understand some words, but that he knew what to do when struggling to express his thoughts (id.). Although on two occasions while in other classes the student became frustrated when he was not understood, the teacher reported that in her classroom he had been patient when asked to repeat himself (id.). When asked whether the student's then-current placement and level of services were appropriate, the teacher opined that the placement was appropriate, but that in the coming year, the student did not necessarily need as many hours of related services as he was currently receiving (id.).

On April 24, 2018, the student's teacher prepared a progress report which indicated that the student enjoyed going to school, learning, and engaging in large group instruction (Dist. Ex. 15 at p. 1). The teacher described the student as "energetic, friendly, and sociable," noting that he consistently shared information, made strong connections to the discussion, and enjoyed being able to teach peers about a topic in which he felt he was an expert (id.). Socially, the student had positive interactions with peers, and was imaginative and playful but, at times "just like peers his age," the student needed reminders to "keep his hands to himself" and with a quick reminder redirected himself (id.). With respect to mathematics the progress report indicated that the student counted with one to one correspondence, identified numbers 1-10 and counted much higher, and demonstrated a basic understanding of addition (id.). The teacher noted that since late November the student was able to identify 11 more letters of the alphabet, that he had begun to label his illustrations with initial sounds, and that he cut out objects beginning with the same letter sound most times independently (id. at pp. 1-2). According to the teacher, the student exhibited "consistent progress" and had grown in his social/emotional development, in that he was "okay with making mistakes" and took "setbacks in stride" (id.). Although at times the student needed teacher support, he handled "most conflict in a pro-social manner" (id. at p. 2). Additionally, the teacher indicated that the student was able to communicate his wants and needs independently, was well liked by his peers, approached learning with confidence and motivation, was independent, and completed activities with little or no scaffolding (id.). The student's teacher concluded that overall, the student was "thriving in his current classroom environment" (id.).

Turning to the April 2018 CSE meeting, according to the IEP participants included the parents, a special education teacher, the school psychologist who also participated at the meeting as the district representative, the student's teacher, the district speech-language pathologist, the district occupational therapist, the district school counselor, two district social workers, as well as the private neuropsychologist who attended the meeting by telephone (Dist. Exs. 18 at p. 15; 20 at p. 1). According to the meeting minutes, the school psychologist informed participants at the meeting that she had "read all of the reports and gave the specialized reports to the specialists" in addition to herself and a social worker conducting classroom observations of the student (Dist. Ex. 20 at p. 1). At that time, the student's teacher provided an account of how the student was performing academically in the classroom, specifically reporting that the student had a positive attitude about going to school, shared information, made predictions, applied concepts, loved reading, labeled using initial sounds, and was "already doing some things that the Kindergarten students do" (id.). Socially, the teacher reported that the student was "socially one of the most popular kids in the class," that he helped to "bring out some of the shy children in the class," played

well with others, and motivated other children (*id.*). Although the student "always want[ed] to be right" and at the beginning of the school year "had a hard time with feedback," he now took feedback well (*id.*).

The April 2018 CSE meeting minutes reflect that the private neuropsychologist reviewed the results of her evaluation of the student, noting that his overall cognitive skills were in the high average range with a "personal weakness" in working memory skills (Dist. Ex. 20 at pp. 1-2). At the meeting she further described that the student had difficulty with expressive language, rapid naming, articulation, communication frustration, graphomotor skills, attention and executive functioning (*id.* at p. 2). Turning to the CSE's discussion of the student's placement, in her March 2018 report, the private neuropsychologist had recommended that for the 2018-19 school year the student "transition to a placement within a small (i.e., student-to-teacher ratio), structured and supportive classroom setting that [was] housed within a small, nurturing school environment," and during the meeting she informed the CSE that Churchill had 12 students per class, all of whom had "speech based" impairments or learning disabilities (Parent Ex. G at p. 14; Dist. Ex. 20 at p. 5). At the CSE meeting the school psychologist acknowledged that the student had been accepted to Churchill and discussed the district's obligation to recommend a placement in the LRE, as well as the opinions of district staff that the student was "functioning appropriately in pre-k," that he could meet his goals in a general education class with OT, speech-language therapy and counseling, and that "[i]t would be a disservice to him to be placed in a special education school based on fear of what might happen" (Dist. Ex. 20 at p. 5). The meeting minutes reflect that the school psychologist, speech-language pathologist, classroom teacher, occupational therapist, and school counselor did not believe that the student needed "a small class at a special education school," and that as the district representative, notwithstanding the private neuropsychologist's recommendation, the school psychologist would not recommend "a private special education class" for the student because it was too restrictive (*id.* at p. 6; *see* Tr. p. 198).<sup>15</sup>

The private neuropsychologist testified that during the March 2018 evaluation the student had difficulty expressing himself, needed some scaffolding, exhibited articulation difficulties that affected listener comprehension, and was fidgety, "a little impulsive at times" and displayed "mild self-regulation difficulties" despite one-on-one attention (Tr. pp. 219). She further testified to the student's working memory, expressive language, and phonological difficulties and stated that those "red flags and weaknesses" could contribute to language-based learning difficulties and disabilities that required the delivery of material in a multisensory format to "maximize" the amount the

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<sup>15</sup> In addition to discussion of a general education placement and Churchill, according to the April 2018 CSE meeting minutes the CSE discussed ICT services, described as a "class" composed of 60 percent general education students that used a general education curriculum (Dist. Ex. 20 at p. 6). Potential difficulties with an ICT "class" discussed during the meeting included that it was composed of "more severely impaired students," that it could be "overstimulating," and that the school psychologist believed it was "overkill" (*id.* at p. 5). The school psychologist testified that the school staff working with the student did not think he needed an ICT class, but she was willing to make that recommendation as a "compromise" with the parents and because the private neuropsychologist believed some form of special education other than related services was needed (Tr. pp. 94-95, 191; *see* Dist. Ex. 20 at pp. 5-6). The school psychologist testified that special education teacher support services (SETSS) was not considered because the student wasn't having any academic, cognitive, or executive functioning delays that required a special education teacher (Tr. pp. 178-79).

student could learn (Tr. pp. 222-224, 226). Given the student's sensory motor and visual motor precision skill weaknesses, the private neuropsychologist opined that "there would be difficulties perhaps" with writing fluency (Tr. p. 225). She further testified that the student's communication difficulties contributed to impaired social relationships and a tendency to withdraw and resulted in "mild conflicts" with peers in the classroom (Tr. p. 228). According to the private neuropsychologist, the student would not make meaningful progress in a general education setting with related services because "it's not a language-based setting," and would not address the student's areas of particular weakness (Tr. p. 237). Additionally, she opined that the class would be too large and overstimulating for the student, especially because she saw "emerging executive functioning difficulties," that to her "definitely seemed like [the student] could be on the trajectory of an ADHD diagnosis" (*id.*). Based on the results of her evaluation, the private neuropsychologist testified that the student needed a language-based setting that utilized a multisensory approach in a small, structured and highly supportive environment that could provide individualized attention to meet his needs (Tr. p. 229).

The district school psychologist stated that the March 2018 neuropsychological evaluation of the student was like "looking under a microscope" and that "every time you look at an individual subtest under the microscope, where the child can't access other things, you're going to find some areas of weakness" (Tr. p. 193). In this instance, the school psychologist testified that the areas of weakness the student exhibited were "very minimal and very secluded" because according to the "quantitative numbers, nothing was really significantly delayed" (*id.*). She believed that the private neuropsychologist felt that the student was a "high-risk child" who needed more support because he was "going to be at risk for having more significant problems" due to his frustration, attention, and language issues (Tr. pp. 194-95).

In contrast to the private neuropsychologist's testimony about the student's at-risk indicators derived primarily from her evaluation, in which overall the student performed in an above average manner, the school psychologist and the student's teacher presented the student as performing at an age-appropriate level in the general education environment with typically developing peers, lending support to the April 2018 CSE's determination that the student would be able to make progress without a more restrictive special class placement. Therefore, the evidence in the hearing record provided by district staff, who had ongoing experience with the student and who indicated that he was functioning as a typical student in the general education setting, supports the IHO's finding that the district offered the student a FAPE for the 2018-19 school year. Accordingly, I decline to overturn the IHO's finding that the district offered the student a FAPE on the asserted grounds.

## **2. Speech-Language Needs and Services**

In addition to the concerns regarding the student's need for a special class placement versus a general education program, a dispute regarding how to address the student's related services needs remains.

In late January 2018 the parents obtained two private speech-language evaluations of the student due to, according to the April 2018 IEP, their concerns about the student's articulation

skills and a recent regression in his articulation and speech intelligibility (Dist. Exs. 9; 10; 18 at p. 2).<sup>16</sup>

The January 17, 2018 private speech-language evaluation report reflected the results of administrations of the Clinical Evaluation of Language Fundamentals – Preschool: Second Edition (CELF-2), the Goldman Fristoe Test of Articulation Second Edition (GFTA-2), and the Phonemic Awareness Inventory as assessments of the student's speech and language skills (Dist. Ex. 10). On the CELF-2 the student's performance resulted in a receptive language index standard score of 117 (87th percentile), an expressive language index standard score of 107 (68th percentile), language content index standard score of 110 (75th percentile), a language structure index standard score of 114 (82nd percentile) and a core language standard score of 125 (95th percentile) which fell in the above average range for his age (id. at p. 1).<sup>17</sup> However, according to the evaluator, the student's "notable difficulty" with the concepts and directions subtest "will lead to difficulties following classroom directions incorporating location concepts" and this difficulty combined with his difficulty recalling sentences "may be a result of working memory difficulties," which if present, "could have a significant impact in the classroom as well" (id. at p. 6).<sup>18</sup> Additionally, the evaluator reported that the student exhibited syntactical errors that affected his ability to be understood, therefore it was "essential" that the student receive services to improve those areas of deficit (id.).<sup>19</sup> With respect to results of the Phonemic Awareness Inventory, the January 17, 2018 speech-language evaluation report indicated that the student demonstrated strengths in identifying rhyming pairs and segmenting words, but difficulty discriminating same/different word pairs, generating rhymes, counting syllables, blending, and isolating sounds (id. at p. 7). The evaluator opined that it was essential that the student be able to discriminate between words that were the same/different in order to attend during classroom activities and concluded that therapy to promote mastery of all phonological awareness skills was warranted (id. at pp. 4, 7). Regarding articulation skills, the January 17, 2018 speech-language evaluation report reflected that the student achieved a standard score of 107 on an administration of the GFTA-2, "indicating average articulation skills for age and developmental level" (id. at p. 5). However, the evaluator reported that some of the student's error patterns noted across structured and unstructured tasks were no longer considered developmentally appropriate and that a significant increase in the number of articulation errors occurred during spontaneous and connected speech (id.). The evaluator identified the error patterns that "significantly" reduced the student's intelligibility and

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<sup>16</sup> I note that the hearing record contains a February 22, 2018 hearing evaluation report that indicated at that time the student's hearing was within normal limits bilaterally for speech and tonal stimuli (Parent Ex. F at p. 2).

<sup>17</sup> These composite scores are reflective of the student's performance on nine subtests including sentence structure (99.6th percentile), word structure (50th percentile), expressive vocabulary (95th percentile), concepts and following directions (25th percentile), recalling sentences (37th percentile), basic concepts (84th percentile), word classes-receptive (63rd percentile), word classes expressive (84th percentile), and word classes-total (75th percentile) (Dist. Ex. 10 at p. 1).

<sup>18</sup> According to the evaluator, the student's lowest subtest score, in the 25th percentile, "was within normal limits but below the mean compared to age-matched peers" (Dist. Ex. 10 at p. 2).

<sup>19</sup> The student's pragmatic language skills were deemed to be adequate for his age and development (Dist. Ex. 10 at p. 5).

indicated that intervention was warranted to improve the student's accurate production of phonemes, overall speech intelligibility in all contexts, and ability to repair communication breakdowns (id.).<sup>20</sup> To address the student's speech-language needs and strengthen his communicative competence and success in the academic setting, the evaluator recommended that the student receive three 45-minute sessions of individual speech-language therapy per week (id. at p. 7).

A second private speech-language evaluation report dated January 31, 2018 reflected the parents' concerns that the student's skills in articulation and speech intelligibility had regressed, and that the school-based speech-language pathologist was recommending a decrease in session length from 45 to 30 minutes, and a change from individual to group sessions (Dist. Ex. 9 at p. 1). Throughout the evaluation, the student was observed to fidget and change seating position frequently, and the evaluator reported that remaining seated and focused on table-top tasks was challenging for him (id. at p. 2). To assess the student the evaluator used a parent and therapist interview, the Comprehensive Assessment of Spoken Language (CASL), the Diagnostic Evaluation of Articulation and Phonology (DEAP), clinical observation and informed clinical opinion (id.). An administration of the CASL to the student yielded a basic concepts standard score of 119 (90th percentile-superior), a syntax construction standard score of 78 (7th percentile-very poor), a pragmatic judgement standard score of 104 (56th percentile-slightly above average), and a paragraph comprehension standard score of 113 (81st percentile-considerably above average) (id.). The evaluator reported that despite the student's ability to "excel at standardized test measures of receptive language skills" expected for his age, the student was not "able to consistently demonstrate age appropriate use of such language knowledge during interactions and activities" with either the evaluator or his mother (id. at p. 3). Although the evaluator reported that the student showed capacity for understanding age level language concepts, "he displayed signs of significant expressive language delays characterized by deficits in planning and conveying complex or novel ideas in well-organized utterances, as well as delayed achievement of morphology and syntax skills expected for his age" (id. at pp. 4-6). Specifically, although the student was able to convey one-step or idea at a time, his skills broke down when attempting to initiate, organize, and sequence multiple ideas into narratives for higher level language skills such as hypothesizing, expanding on ideas, and answering open-ended questions (id. at p. 4). The evaluator also noted that the student's morphology and syntax skills were "severely delayed for his age" and he demonstrated decreased use of verb tenses, function word omissions, misuse of pronouns and prepositions, and incoherent word order as he attempted to formulate and verbalize longer more complex ideas (id. at p. 3). The evaluator opined that given the student's expressive language delays and reported difficulty with self-regulation and metal flexibility, he "may be at risk for executive functioning deficits" (id. at p. 5).

The January 31, 2018 speech-language evaluation report described the student as displaying severe dysfluencies including pauses, whole and part word repetitions, phrase repetitions, and blocks as well as secondary physical characteristics including eye blinking/closing, increased fidgeting, and changes in breathing when attempting to break down what he wanted to

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<sup>20</sup> The January 17, 2018 speech-language evaluation report indicated that the student's oral motor/swallow mechanism, voice, and fluency parameters were within functional limits (Dist. Ex. 10 at pp. 5-6).

say into sequenced and logical steps (Dist. Ex. 9 at p. 4).<sup>21</sup> According to the evaluator, the student did not appear to be aware of his dysfluencies, and he was not dysfluent when producing shorter or highly routine utterances, which the evaluator indicated were characteristics of a fluency disorder known as "cluttering" (*id.*).<sup>22</sup> With respect to the student's oral motor skills the January 31, 2018 speech-language evaluation report indicated that the student had no overt structural abnormalities, but that during the evaluation he displayed signs of poor jaw, tongue, lip and cheek control and coordination, which contributed to his consonant substitutions and vowel distortions as well as the mumbling or slurred quality of his speech (*id.* at p. 5).<sup>23</sup> The DEAP oral motor screen results indicated that the student showed compensatory and extraneous movements, poor motor planning and sequencing, intelligibility, and fluency, with a raw score of 20, which was considered to be significantly below the criterion score expected for his age (*id.*). During the single word articulation assessment of the DEAP the student demonstrated three consonant errors and vowel distortions, but due to the single word nature of the assessment the student scored within the normal range for his age although the evaluator opined this did not fully reflect the student's speech motor challenges (*id.* at p. 6). The evaluator reported that the student demonstrated signs of a speech motor disorder with delay in mastery of foundational oral motor skills, inconsistent and uncommon phonemic errors, articulatory placement errors, and reduced intelligibility that increased "tremendously" in severity at the connected speech level (*id.*). She determined that the student's speech motor skills were approximately 33 percent delayed for his age, and appeared to be affecting his intelligibility with peers and family, impeding his participation in daily routines and social/academic school activities, and further reducing speech intelligibility when compounded with his expressive language delay (*id.*). To address the student's individual speech-language needs the evaluator recommended that the student receive three 45-minute sessions of individual speech-language therapy per week on a 12-month basis (*id.* at p. 7). The evaluator indicated that because of the student's difficulties with focus and attention and need for periodic sensory-motor breaks to maintain and extend joint attention and motivation, a small group setting would not be appropriate (*id.*). Further, given the nature of the student's speech-motor disorder the evaluator recommended the use of a "combination of approaches such as Oral Placement Therapy" or the PROMPT method (*id.*).

According to the March 2018 neuropsychological evaluation report, the private neuropsychologist administered subtests of the WIAT-III, selected subtests of the NEPSY-II: A Developmental Neuropsychological Assessment, Second Edition (NEPSY-II) and the CASL to

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<sup>21</sup> The January 31, 2018 speech-language evaluation report of fluency/cluttering concerns is in contrast to the January 17, 2018 speech-language evaluation which found the student's fluency skills to be "within functional limits" (compare Dist. Ex. 10 at p. 6, with Dist. Ex. 9 at p. 4).

<sup>22</sup> According to the January 31, 2018 speech-language evaluation report, "cluttering is distinguished from stuttering in that those who clutter also have difficulty with organizing and planning not only the motor elements of speech production, but also appear to be disorganized and incoherent in language or conversation skills" (Dist. Ex. 9 at p. 4).

<sup>23</sup> The January 17, 2018 speech-language evaluation report did not identify structural or motor control concerns regarding the student's oral motor functions in contrast to the January 31, 2018 speech-language evaluation report which indicted the student had approximately a 33 percent delay with respect to speech motor skills (compare Dist. Ex. 10 at pp. 5-6, with Dist. Ex. 9 at pp. 5-6).

assess the student's receptive, expressive, pragmatic, and phonological language skills (Parent Ex. G at p. 7).<sup>24</sup> The private neuropsychologist reported that the student's performance on CASL measures of receptive language and comprehension skills was in the extremely high range (99th and 98th percentile, respectively) and that he performed in the extremely high range (98th percentile) on the oral discourse comprehension subtest from the WIAT-III (*id.* at pp. 7-8). The student's performance on the NEPSY-II language subtest that required him to follow single and multi-step directions was in the high average range (84th percentile), and his receptive vocabulary score which fell in the average range (61st percentile), "signif[ied] an area of weakness within his language profile" (*id.* at p. 8). Expressively, the private neuropsychologist reported that although the student's "speech prosody, rate, intonation and volume seemed adequate," his overall articulation and language quality presented as mild to moderately impaired, which made it difficult at times for the evaluator to understand the student's responses (*id.* at p. 6).<sup>25</sup> Regarding the student's expressive language ability, WIAT-III and CASL results indicated that the student's expressive vocabulary skills were in the average range—61st and 70th percentile, respectively—which the evaluator deemed to be a "personal area of weakness," and his ability to recall and repeat sentences verbatim on the WIAT-III was also in the average range (25th percentile) (*id.* at p. 8). The student's performance on a task from the CASL that required him to retrieve language and respond with a single word to meaningfully complete a sentence was in the very high range (94th percentile), and he performed in the very high range on a WIAT-III verbal fluency task (97th percentile) (*id.*). According to the March 2018 neuropsychological evaluation report, with respect to pragmatic language skills, CASL results showed that the student performed in the very high range (92nd percentile), suggesting a "well-developed ability to apply information from the world and use it for effective social communication" (*id.*). Administration of NEPSY-II subtests measuring the student's phonological processing skills and awareness of sound relationship skills yielded a score in the average range (63rd percentile), and a score in the high average range (84th percentile) for his ability to rapidly retrieve and name phonological information; however, the evaluator noted that the student sacrificed accuracy for speed, performing at the 95th percentile for the time it took to complete the activity but only between the 11th-25th percentile range for his level of accuracy (*id.* at p. 9). The private neuropsychologist concluded that the student exhibited "significant strength" in his language comprehension and pragmatic abilities, but weaknesses in his expressive language skills (vocabulary, syntax construction, sentence repetition), phonological processing and rapid naming skills, warranting a diagnosis of language disorder (*id.* at pp. 12-13). She further indicated that the student presented "with significant and pervasive difficulties with language clarity and articulation, which interfer[ed] with his ability to effectively communicate with others," therefore meeting the criteria for diagnosis of a speech sound disorder (*id.* at p. 13). As such, the private neuropsychologist recommended that the student receive "at least three" sessions per week of "ongoing support through intensive speech and language therapy" in a

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<sup>24</sup> The March 2018 neuropsychological evaluation report also provided information about the student's "verbal cognitive skills" as measured by the WPPSI-IV (Parent Ex. G at p. 7). Specifically, the student's verbal reasoning subtest score was within the very high range (91st percentile) and his verbal knowledge subtest score was within the high average range (75th percentile) (*id.*).

<sup>25</sup> As a result, the student warranted closer support and additional questioning to ensure clarification of the responses (Parent Ex. G at p. 6). Further, the private neuropsychologist noted that even with individual support, scheduled breaks, and close attention the student's attention and focus fluctuated and required redirection during less desirable activities, particularly during language-based tasks (Parent Ex. G at p. 6).

combination of small group and individual sessions, to include a multisensory, language-rich curriculum and the PROMPT method, and which emphasized efficient expressive communication and pragmatic language skills (id. at pp. 13-14).

In April 2018, the private speech-language pathologist who provided one 60-minute group speech-language therapy session per week to the student prepared a progress report (Dist. Ex. 16 at p. 1). According to the report, the student was receiving speech therapy utilizing the PROMPT method, with sessions focusing on drills that incorporated planning, sequencing and timing of the articulators for intelligible speech production (id.). The report noted that the student was ten percent unintelligible in a known context with a familiar listener, less than fifty percent intelligible in unknown contexts with an unfamiliar listener, was resistant to repeating himself when not understood, and displayed significant frustration with his family but rarely demonstrated frustration during group therapy sessions (id.). The provider indicated that the student performed at or above age expectancies during receptive language tasks and used correct sentence structure and grammar when telling/retelling a story (id.).<sup>26</sup> The provider indicated that the student displayed oral motor planning deficits, difficulty imitating and producing oral motor movements as well as alternating movements, and presented with inconsistent speech errors and frequently observed groping patterns (id.). The student's rate of speech was described as "slow and labored when given targeted phrases/sounds due to groping patterns," he exhibited difficulty with the speed and accuracy of articulatory movement, and planning deficits, but with periods of accurate sound production of targeted sounds spontaneously without difficulty consistent with apraxia of speech (id.). Based on the student's diagnosis of apraxia of speech the provider recommended that the student receive two 45-minute individual sessions per week and one 60-minute group therapy session per week (id. at p. 2).

Turning to the information about the student's speech-language needs prepared by district staff, a January 8, 2018 district speech-language progress report indicated that the student had been receiving two 45-minutes sessions per week of individual speech-language therapy since September 5, 2017 (Dist. Ex. 2 at p. 1). According to the report, a December 2017 administration of the Preschool Language Scale – 4 to the student yielded an auditory comprehension standard score of 125 (95th percentile), an expressive communication standard score of 111 (77th percentile), and a determination that the student presented with "overall language skills in the above average range" (id.). Despite the student's age appropriate performance on the standardized assessment the district speech-language pathologist noted that informally, the student used inappropriate syntax, omitted morphological endings and function words, mixed up subject-verb agreements and pronouns, and used a fast rate of speech that resulted in decreased intelligibility (id. at p. 2; see Tr. p. 278). Additionally, during spontaneous speech the student sometimes dropped syllables from multisyllabic words and distorted sounds within words, although the student could improve speech intelligibility when given modeling, multisensory prompting to use an appropriate rate, and strategies to increase awareness about his speech (Dist. Ex. 2 at p. 2). The January 2018 speech-language progress report indicated that the student had met the articulation and expressive language goals, and the speech-language pathologist provided new goals in those

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<sup>26</sup> The student's reported use of correct sentence structure and grammar during private therapy sessions was in contrast to the results of the January 31, 2018 speech-language evaluation, which determined that the student's syntax and morphology skills were "severely delayed for his age" (compare Dist. Ex. 9 at p. 3, with Dist. Ex. 16 at p. 1).

areas as well as a recommendation that the student receive two 30-minute sessions per week of speech-language therapy in a group of three (id.).

The April 2018 IEP reflected then-current updated information from the district's speech-language pathologist about the student's progress and continued needs (Dist. Ex. 18 at p. 2). The April 2018 IEP indicated that the student adequately followed single and multi-step directions in both the therapy and classroom settings (id.). According to the IEP, the student had made "significant improvement in his syntactical development" in that he identified and used some previously deficient tenses, pronouns, and verbs with 80 percent accuracy in structured tasks, although he continued to exhibit difficulty identifying and using subject verb agreements and irregular past tense (id.). However, the IEP indicated that "[g]iven [the student's] strong comprehension of these grammatical structures, his ability to follow directions, and his previous rate of improvement, with continued explicit instruction it is expected that his grammatical structures in speech will improve greatly" (id.). The IEP reflected reports that the student's speech intelligibility was approximately 80 percent to familiar listeners but that both articulation and sentence structure broke down when the student engaged in conversation and during spontaneous speech (id.). The student's articulation was reportedly affected by his fast rate of speech—which he could modify with reminders—that resulted in a tendency to reduce multi-syllabic words into fewer syllables and distort sounds (id.). The April 2018 IEP indicated that the student benefitted from multiple opportunities to speak with others and participate in group activities which allowed for peer modeling, peer feedback, and a more natural context for speech (id.). According to the April 2018 IEP, the speech-language pathologist used clinical judgement and observation of the student in the therapy setting and classroom to conclude that he exhibited typical speech dysfluencies for his age (id.). Results of a March 2018 motor speech examination reflected in the IEP indicated that the student's facial, mandible, and tongue musculature were symmetrical, and he demonstrated "appropriate lip retraction, adequate tension in cheeks, and equal compression of lips" (id.). Additionally, the student demonstrated the ability to open his jaw wide, adequately elevate and depress his mandible, and adequately protrude, lateralize and elevate his tongue (id.). However, the IEP indicated that the student demonstrated difficulty lateralizing his jaw and did not dissociate his jaw from his tongue during certain tasks, which may affect his overall intelligibility specifically during connected speech (id.). The student also produced an age appropriate "alternate motion" (diadochokinetic) rate and sequential motion rate, indicating that his "oral motor functioning within normal limits with specific areas to monitor for improvement within articulation therapy tasks" (id.).<sup>27</sup>

As described in detail above, with respect to the student's communication needs the April 2018 CSE considered multiple speech-language reports that portray varying perspectives of the student (see Parent Ex. G; Dist. Exs. 2; 9; 10; 16; 18 at p. 2). Although the various speech-language reports define the student's speech-language needs with differing severity and root diagnoses, some commonality presented itself. The student exhibited expressive language difficulties related to

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<sup>27</sup> According to the April 2018 IEP, the student's phonatory/respiratory system appeared to be functioning within normal limits regarding quality, pitch, duration, steadiness and loudness, and although the student at times used a speech volume that was considered to be too loud, he could be redirected to use a more appropriate volume (id.).

syntax (sentence structure) and a speech sound disorder, both of which increased in severity at the complex spontaneous speech level (Parent Ex. G at pp. 12-13; Dist. Exs. 2 at p. 2; 9 at pp. 4-7; 10 at pp. 5-7; 16 at p. 1; 18 at p. 2). I now turn to the April 2018 CSE's speech-language therapy recommendation to remediate those deficits.

The speech-language pathologist who provided the student's services during the 2017-18 school year testified that the student exhibited speech sound production and connected speech deficits during conversation that affected his overall intelligibility, as well as difficulty mastering the "syntactical structures of spoken language" (Tr. pp. 270, 281, 283-84). She testified that she conducted a "formal standardized speech-language assessment" the results of which indicated his language skills were in the average range, and also non-standardized assessments that identified his difficulty with syntax and intelligibility (Tr. pp. 285-87). During the time she worked with the student, the speech-language pathologist observed that he had "made good improvement in his articulation" and phonological skills in that he no longer demonstrated a number of phonological processes, his mean length utterance increased, and he was using two more word endings (Tr. pp. 287-89). She testified that several of the student's 2017-18 IEP speech-language annual goals had been met or significant progress toward them had been made (Tr. pp. 288-89; see Parent Ex. X at p. 9).

The speech-language pathologist testified that in preparation for the April 2018 CSE meeting she reviewed the private speech-language evaluation reports and stated that the standardized scores were consistent with her own work and impressions of the student's speech-language skills (Tr. pp. 289-90). However, she stated that that the narratives in those private evaluation reports did "not consistently support the test results, nor [did] they support [her] impressions of [the student's] skills at the time" (Tr. pp. 290-92). Specifically, the speech-language pathologist testified that unlike the January 19, 2018 speech-language evaluation report, she did not observe a concern with the student's ability to follow directions in the school environment stating "[h]e follows directions with repetition, as needed, similar to his peers," and that any difficulty the student had with following directions was linked to his interest and motivation, not an inability to comprehend the direction (Tr. pp. 291-92; see Dist. Ex. 9 at p. 3). With respect to the private report that indicated the student's morphology and syntax were severely delayed—which she opined was a reflection of the student's standard score—the speech-language pathologist testified that "functionally, within the academic context, [the student] was able to adequately and appropriately comment and engage in dialogue about the past, present, and future, using various verb tenses, not always the accurate conjugation, but nothing that would suggest a severe delay in language expression" (Tr. p. 292; see Dist. Ex. 9 at p. 3). Also, the speech-language pathologist further testified that she did not agree that the student presented with severe disfluencies characteristic of cluttering, rather, she stated that the task used to assess the student "would pose a big challenge" for any student of his age and was not a dynamic fluency assessment which used a wide range of tasks (Tr. pp. 292-933; see Dist. Ex. 9 at p. 4). The speech-language pathologist also indicated that at school the team who worked with the student, including herself, the occupational therapist, the teacher, and the school counselor, did not observe the student to have a fluency or cluttering disorder and noted that another private assessment "also did not find any disfluencies or evidence of cluttering" (Tr. pp. 293-94).

Turning to the January 31, 2018 private speech-language evaluation report, the district speech-language pathologist testified that the student's within normal limits language assessment

scores, mildly reduced language skills, therapy recommendation for grammatical markers and intelligibility, findings of adequate oral motor skills and fluency were consistent with the majority of her findings (Tr. p. 298; see Dist. Ex. 10 at p. 4). She testified that what she did not find consistent was the recommendation that individual therapy was "essential due to [the student's] frustration because of reduced intelligibility, in order to target all goals, and due to difficulty attending to and retaining information with distraction" (Tr. p. 299; see Dist. Ex. 10 at p. 7). The speech-language pathologist testified that she considered the problem areas identified in the January 31, 2018 speech-language evaluation report, but stated that "frustration was not observed in the classroom context or therapy sessions," and that the student "was easily redirected if there were instances when he was not understood and had to repeat himself" (Tr. p. 299). The speech-language pathologist stated that in the classroom the student was an active participant, shared and articulated his needs and wants, and although there were moments when he did present with difficulty being understood and needed to repeat himself, he was able to be redirected during those times (Tr. p. 304). She stated that the student's difficulty with attention was only noted when he was asked to work and complete tasks for an extended amount of time, but that when given reinforcers he was able to attend and complete the task presented (Tr. pp. 299-300).

With respect to the April 2018 private speech-language summary report, the speech-language pathologist testified that she considered the provider's statement that the student was super motivated, performed at or above age level in receptive tasks, presented with confidence, and rarely exhibited frustration when not understood in group sessions (Tr. pp. 300-01; see Dist. Ex. 16). She further testified that she considered but did not observe, as other reports did not, the characteristics of a diagnosis of apraxia of speech (Tr. p. 300-301; see Dist. Ex. 16).

The April 2018 CSE meeting minutes reflected the speech-language pathologist's discussion of her January 2018 progress report and the student's difficulty with syntax, grammar, and articulation (Dist. Ex. 20 at p. 2). School staff indicated during the meeting that "a lot of work" in kindergarten is speech and language based, is part of the curriculum, and that the student would "receive a lot" of support for phonological awareness and pre-reading skills in the classroom (id. at p. 3). As indicated above, the speech-language pathologist considered the results of her own assessments and those of the private evaluators/providers, and her observation of the student in therapy sessions and in the classroom environment, and for the 2018-19 school year recommended that the student receive two 30-minute sessions per week of speech-language therapy in a group (Tr. pp. 303-04; see Dist. Ex. 18 at p. 9).<sup>28</sup> With respect to the private evaluator's recommendation that the student receive three 45-minute sessions per week of individual speech-language therapy, the speech-language pathologist stated individual sessions were recommended "only because of [the student's] difficulty with attention and focus and his need for sensory motor breaks in order to maintain joint attention and motivation" (Tr. p. 295; see Dist. Ex. 9 at p. 7). However, the speech-language pathologist testified that the student "could consistently work for 30 minutes on target therapy goals without demonstrating difficulty with focus and attention," and that during the 45-minute sessions she provided during the 2017-18 school year the last 10 minutes of the session "were always difficult" as it was hard for anyone to sustain attention "for that long" (Tr. pp. 296-97). The speech-language pathologist opined that the student did not need the additional 15 minutes of the 45-minute session because she found that the extended time was when she observed

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<sup>28</sup> The district representative indicated that the speech-language pathologist and the teacher believed the student's speech-language deficits "could well be handled with related services" (Tr. pp. 91-92).

difficulty with the student's attention, focus and motivation (Tr. pp. 303-04). She also stated that the additional time the student was removed from the classroom was disruptive because he knew what he was missing and wasn't able to integrate back in during that period, but rather had go back into the next activity (Tr. p. 304).

With regard to the recommendation for group rather than individual therapy sessions, the speech-language pathologist stated that the student's more powerful reinforcers and "main motivators were peer interactions and play opportunities, which [she] took into account when considering [her] mandate recommendation for kindergarten" and why she recommended a group setting (Tr. pp. 296, 300). Additionally, the speech-language pathologist indicated that group therapy was created specifically to integrate students into a least restrictive learning environment during which all goals for all student were aligned and targeted (Tr. pp. 299, 304-05). Because the student was making progress in the pre-kindergarten program, she determined that it was appropriate to move the student into a less restrictive program and reiterated the reinforcing nature for this student of working with peers (Tr. pp. 305, 308). Further, the speech-language pathologist indicated that working with one other student, or up to two at most, gave the student "the chance to learn from peer models or be a peer model to other students," which she felt would be helpful to increase his self-esteem and self-image, improve his self-awareness and self-monitoring, and that he would be positively reinforced by the acceptance of his peers (Tr. p. 305). The speech-language pathologist also stated that a one-to-one setting with the therapist was not only too restrictive for the student's needs, but it limited his ability to use his speech-language skills in a functional, natural context because it did not allow natural opportunities for conversational speech, which was the area recommended to target his intelligibility (Tr. pp. 305, 308).

In response to the parent's concerns expressed at the April 2018 CSE meeting, that the student needed more speech-language therapy services, the meeting minutes reflected that the speech-language pathologist provided feedback about the student's phonological awareness and phonological processing skills (Dist. Ex. 20 at pp. 3-4). She indicated that the student's speech sounds were "within an average level," he did not have a high level of unintelligibility, he was 80 percent intelligible to familiar listeners, and that certain sound were not yet expected at his age (id. at p. 4). The speech-language pathologist indicated that the student would continue to work on speech sound production within the natural speech/conversation activities, and review of the April 2018 IEP speech-language annual goals shows they were designed to improve the student's use of appropriate syntactical structures within sentences during spontaneous speech, and his overall speech intelligibility in spontaneous speech by using appropriate volume, rate, and all words and sounds within sentences (Dist. Exs. 18 at pp. 7-8; 20 at p. 4). The IHO determined that the district's speech-language pathologist "explained in detail how she reached her well reasoned conclusion regarding the speech services that the district was recommending and placed on the IEP," and appeared persuaded by the opinions of district staff who worked with the student at the time of the April 2018 CSE meeting regarding the student's needs and how to address them over those of the private evaluators and providers (see IHO Decision at pp. 12-14). My review of the hearing record supports the IHO's conclusion, and I decline on this basis to overturn the IHO's finding that the district offered the student a FAPE during the 2018-19 school year.

### 3. Occupational Therapy

Next, I will turn to the parties' dispute regarding how to address the student's OT related services needs.

The hearing record includes a February 2018 OT progress report prepared by a private occupational therapist, who provided two 45-minute individual sessions per week of OT to the student at an outpatient clinic (Parent Ex. E at p. 1). At the time of the progress report the student's OT sessions focused on improving his sensory processing skills to enable participation in age-appropriate activities with improved regulation (id.). The occupational therapist reported that the student continued to present with difficulty remaining flexible and transitioning appropriately, but that specific types of sensory input improved his regulation which translated to improved focus, organization of thoughts, and increased flexibility to complete activities with greater success (id.).

With respect to sensory processing and regulation, the February 2018 OT progress report indicated that the student presented with difficulty processing sensory stimuli, which impacted his ability to self-regulate and maintain appropriate body awareness when navigating through environments (Parent Ex. E at p. 2). The occupational therapist noted that the student had difficulty processing and registering vestibular sensory input and as a result he was observed to engage in sensory-seeking behavior (id.). She reported that the student had demonstrated improvement in this area but continued to present with some vestibular-processing challenges and difficulty modulating that input (id.). According to the occupational therapist, the student also sought out proprioceptive input and demonstrated improvement in regulation when he received input including "heavy work" (id.). The progress report indicated that therapeutic listening was utilized as a strategy to improve the integration of the student's auditory, visual, and vestibular senses (id.).

Regarding the student's neuromuscular status, the February 2018 OT progress report indicated that the student presented with decreased strength in his core/postural muscles which affected his endurance (Parent Ex. E at p. 3). The student was noted to complete movements at a quick pace and had difficulty grading his movements in a safe appropriate manner because he lacked the ability to move at a more controlled, slower, yet more efficient pace (id.). The student was reported to have made progress and with his improved alignment and more upright posture, had also demonstrated improved motor control and accuracy when participating in fine-motor tasks (id.). The progress report noted that the student used a compensatory grasp while coloring and cutting due to decreased stability at the arm, shoulder and core muscles (id.). The occupational therapist indicated that when the student was in a state of dysregulation, he demonstrated difficulty remaining seated and attending to the fine motor and visual-motor tasks presented and may seek out sensory stimuli in inappropriate, unsafe ways such as using increased force when managing materials or throwing objects (id.).

The February 2018 OT progress report also indicated that the occupational therapist had administered the Peabody Developmental Motor Scales, Second Edition (PDMS-2) to the student to assess his fine motor and visual motor skills as they affect daily functioning and participation (Parent Ex. E at p. 3). She reported that the student's difficulty processing sensory stimuli "significantly" affected his ability to engage and sustain attention to fine-motor and visual-motor tasks (id.). The student reportedly demonstrated difficulty remaining seated at the table and attending during formal assessment, which impacted his ability to persevere through challenging

tasks, including novel and unfamiliar tasks that required problem-solving to work through (id. at p. 4). The student achieved a PDMS-2 grasping subtest score in the 37th percentile, and a visual-motor integration subtest score in the 50th percentile (id.).

The February 2018 OT progress report provided information about the student's progress toward his then-current annual goals and short-term objectives and indicated that the student had demonstrated progress, but continued to require support and strategies as the demand in his academic, social or play environments continue to increase (Parent Ex. E at pp. 4-6). Based on informed clinical opinion, clinical observation, and standardized testing, the occupational therapist concluded that the student presented with a greater than 25 percent delay "in the areas of sensory processing and regulation, motor planning and coordination, proximal strengthening, and fine-motor and visual-motor skills" (id. at p. 6). The occupational therapist opined that the student was "at risk for more significant regression" as demonstrated by the loss of skills following school breaks, holidays, and missed sessions (id.). Therefore, the occupational therapist recommended that the student receive OT on a 12-month basis and continue at a frequency and duration of two 45-minute individual sessions per week (id.).

The March 2018 private neuropsychological evaluation report discussed above also reflected results from administrations of WPPSI-IV and NEPSY-II subtests that assessed the student's nonverbal reasoning, visual-spatial and visual-motor skills (Parent Ex. G at p. 9). On tasks that evaluated fluid reasoning skills the student performed in the extremely high range (98th percentile), and in the very high range (95th percentile) on tasks that measured visual-spatial skills; a "significantly stronger performance" when compared to his previous assessment in 2016 (id.).<sup>29</sup> The report further indicated that with respect to sensory motor activities from the NEPSY-II, the student performed "above expectations" (greater than 75th percentile) on tasks that required the use of his nondominant hand, "only within the 11th-25th percentile range when using his dominant" hand, and in the high average range (84th percentile) overall for timed graphomotor speed and dexterity tasks (id.). The private neuropsychologist concluded that the student's difficulty with sensorimotor activities and graphomotor control and precision required the continuation of OT services (id. at p. 13).

The April 2018 IEP present levels of performance reflected information from the private February 2018 OT progress report, which discussed the student's difficulty with sensory processing, decreased core strength, and results of standardized testing that were in the average range (Dist. Ex. 18 at p. 5; see Parent Ex. E). The present levels of performance also included then-current information about the student's in-school OT services provided by the district occupational therapist (Tr. pp. 335-36; Dist. Ex. 18 at pp. 5-6). Specifically, the IEP indicated that the student received two individual 45-minute sessions per week of OT, and that he had made progress toward his IEP annual goals involving drawing, coloring, strengthening, and scissor skills (id. at pp. 5-6). The IEP indicated that the student enjoyed gross motor activities and sensory-based warm up activities and was able to focus on fine-motor activities for approximately 10-15

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<sup>29</sup> The student achieved these scores despite the private neuropsychologist's observation that at times the student "became somewhat more silly and dysregulated, and he required increased structure and redirection to remain focused," that he "had more difficulty on items with many pieces," and that during a design copying task, the student "showed decreased graphomotor control and slight difficulties with visual motor planning" (Parent Ex. G at p. 9).

minutes (*id.* at p. 6). According to the IEP, the student did "not exhibit significant sensory processing difficulty in the school setting" but he did benefit from engaging in movement activities during the day including movement activities with peers and yard time (*id.*). Specifically, the IEP indicated that at that time, the student did "not require additional movement breaks in order to complete his work in the classroom; however, this is an accommodation that can be easily implemented if [the student's] needs change next year" (*id.*). The student was also noted to transition well from OT sessions back to the classroom (*id.*). The IEP reflected that on a formal assessment measuring foundation skills for writing, the student achieved a visual-motor skills subtest score in the average range, a visual perceptual skills subtest score in the above average range, and a motor coordination subtest score in the below average range (*id.*).<sup>30</sup> The student was provided with an adaptive pencil grip to improve his pencil grasp (*id.*).

The occupational therapist who provided the student's in-school OT during the 2017-18 school year testified that the student benefitted from movement, enjoyed gross motor activities, and exhibited weak, small hand muscles and immature grasping skills (Tr. pp. 340-41, 343-45). She testified that the student made progress during the school year with regard to improved hand muscle strength, scissor skills, drawing and coloring skills, and no longer demonstrated frustration with fine motor tasks (Tr. pp. 356-59).

In preparation for the April 2018 CSE meeting the occupational therapist stated that she considered the February 2018 private OT progress report and the March 2018 neuropsychological evaluation report (Tr. pp. 353-54; *see* Parent Exs. E; G). She testified that the student's private occupational therapist indicated that the student had difficulty with transitions and demonstrated scab-picking behavior, but in the classroom the occupational therapist testified that the student was able to transition from therapy to the classroom without difficulty and picking behaviors were not observed (Tr. pp. 346, 354-55). According to the occupational therapist, the teacher informed her that the student was a role model in class "because he was always doing the routines really quickly" and on time, and that he transitioned with everyone and followed directions (Tr. p. 355).

The February 2018 private OT progress report identified the student's sensory processing needs, and the parties dispute whether the student's need specifically for movement breaks, should have been designated on the April 2018 IEP.<sup>31</sup> The CSE meeting minutes reflected discussion

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<sup>30</sup> According to the IEP, during administration of the motor coordination subtest, the student was observed to "work at a very fast pace which may have negatively impacted his precision," and he reported that his hand hurt after completing that subtest, which may have been due to his difficulty grading his pencil pressure (Dist. Ex. 18 at p. 6).

<sup>31</sup> The occupational therapist that prepared the February 2018 private OT progress report provided testimony via affidavit and direct testimony during the impartial hearing (Tr. pp. 480-493; Parent Ex. GG). Regarding the student's need for movement breaks the private occupational therapist indicated the student required frequent structured movement breaks, customized to the student, throughout the day that would include activities such as "heavy work" with functional activities in the classroom with goal-directed activities with accompanying support, outside classroom activities with one to one support, and vestibular activities to help the student become more regulated to aid focus and attention (Tr. pp. 484-85; Parent Ex. GG at p. 3). The private occupational therapist indicated that time in the school yard was not as substitute for movement breaks as it was "free play" and the intensity of the student's sensory seeking behaviors and self-regulation issues required additional, structured breaks (Parent Ex. GG at p. 3).

that at that time according to the district occupational therapist, the student did not need additional movement breaks and that "kids do a lot of movement in Kindergarten," although if modifications were needed during the 2018-19 school year extra breaks could be added (Dist. Ex. 20 at p. 4).<sup>32</sup> While the school psychologist acknowledged that if the student required movement breaks in the classroom when the occupational therapist was not present, that need should have been designated on the IEP; however, the April 2018 IEP specifically indicated that the student did not require additional movement breaks to complete work in the classroom (Tr. p. 125; Dist. Ex. 18 at p. 6). The occupational therapist testified that she disagreed that consistent opportunities for sensory input needed to be included in the student's IEP, because she believed "what he was getting already in the classroom—the regular movement breaks that all the students benefit from—he was already getting that, so he didn't need additional" movement breaks at that time (Tr. p. 406). She indicated that although the student benefitted from movement, enough was built into the regular kindergarten school day and that the student did not need more (Tr. pp. 408-10).

Turning to the April 2018 CSE's recommendation, according to the CSE meeting minutes the student had made "great improvement in OT" and that although the occupational therapist had previously considered recommending two sessions of OT per week, because he had made such improvement she decided to recommend one 30-minute session per week in group of two to provide socialization (Dist. Exs. 18 at p. 9; 20 at p. 4). The occupational therapist indicated that in deciding to reduce the session frequency she considered having the student be out of the classroom for the least amount of time while still being able to function as needed, and that since the student was performing so well in the classroom she felt "like it's almost a disservice to take him out that much" referring to two sessions per week (Tr. p. 359). She also testified that between December 2017 and April 2018 the student made so much progress that she felt the student would benefit from being in the classroom more and that one session per week would be sufficient for the student to improve his hand strength and grasp (Tr. pp. 360-61, 395).<sup>33</sup> The occupational therapist opined that the student was ready to work in a group, but that she maintained the therapy room setting rather than "push in" services because the student's strengthening goals were better addressed in the therapy room (Tr. pp. 359-60, 397-98). Regarding the decrease in service duration from 45 to 30 minutes sessions the occupational therapist testified that 45-minute sessions were typically for students that required a lot of transitioning time or presented with severe fine motor needs and she did not feel that the student fell into either of those categories (Tr. pp. 354-55, 363).

As with the recommendation from the district speech-language pathologist, the IHO determined that the district occupational therapist "explained in detail how she reached her conclusions regarding OT services needed going forward," and that based upon her work with the student she recommended services she believed were sufficient to address the student's needs (IHO Decision at p. 12). Review of the hearing record supports the IHO's finding on this issue, and there was more than sufficient evaluative information before the CSE upon which it could permissibly

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<sup>32</sup> The CSE meeting minutes indicated that at the meeting, the occupational therapist stated that she could observe the student and talk to his teacher in September 2018 "to get more movement in, if necessary" (Dist. Ex. 20 at p. 4).

<sup>33</sup> The occupational therapist acknowledged that the student had "a lot" of sensory goals in the prior IEP but she testified that in the school environment he was not showing any of those concerns (Tr. p. 361).

rest its determination regarding the level of OT related services to address the student's needs for the 2018-19 school year.

#### **4. Social/Emotional Needs and Services**

Lastly, I will turn to the dispute of whether the April 2018 IEP appropriately addressed the student's social/emotional needs.

The January 11, 2018 counseling progress report indicated that the student began receiving two 45-minute sessions per week of counseling in a group of two on September 11, 2017 (Dist. Ex. 3 at p. 1). The school counselor reported that the student related well to peers and adults, was a sweet and caring student who enjoyed interacting with peers, worked with others, shared appropriately, and had developed many friendships within the classroom (*id.* at p. 1; *see* Dist. Ex. 18 at p. 15). According to the school counselor, the student responded to prompting to adjust his loudness level and had demonstrated improvement in articulating and appropriately expressing his feelings, taking turns, and "moving on" when told he did not follow game rules (*id.*). The student sought assistance from an adult when problems occurred in the classroom and the school counselor reported that the "majority of the time" when the student was frustrated, he asked for help to overcome those feelings (*id.*). The school counselor indicated that the student was "on par" with his peers regarding his social/emotional skills (Dist. Ex. 3 at p. 1). The counseling progress report reflected that the student had met the annual goals related to engaging in interactive play with other children and improving social interactions with peers, and that he had "almost met" the annual goal targeting his ability to learn and implement coping strategies when faced with feelings such as frustration and anxiety (*id.* at pp. 1-2). The school counselor recommended that the student receive one 45-minute session per week of counseling in a group (*id.* at p. 2).

The parent completed a social history survey, which indicated at times the student required "some help with shifting negative thoughts about 'going' to school," and reflected her view that the student needed to work on his related services IEP goals, motor skills, hand skills, ability to process "how to steps," and stay motivated during frustrated periods (Dist. Ex. 4 at p. 1).<sup>34</sup> Although the student related well to peers, the parent reported that he did not speak to peers during play, his speech "continue[d] to be a struggle," and that the parent has had to model his communication to others (*id.* at pp. 1-2). According to the social history, the parent had been advised that the student's behavior was a "non issue," and that his daily interactions in the classroom were what was expected of a "typical pre-K student" (*id.* at p. 3).

In the March 2018 private neuropsychological evaluation report discussed above, the private neuropsychologist described the student as bright, curious and energetic, noting that he presented as a "spontaneous communicator who regularly attempted to interact with the examiner," and that he "exhibited a full and appropriate range of emotion" (Parent Ex. G at pp. 6, 12). The private neuropsychologist reported that the student demonstrated enthusiasm for activities he found enjoyable, and "mild frustration toward more complicated activities" (*id.* at p. 6). According to the report, despite individualized support, scheduled breaks, and close attention, the student's attention and focus fluctuated and at times his behavior became more self-directed, silly, or off-

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<sup>34</sup> The social history is undated, but the school psychologist testified that the parent completed the form as "part of the Turning-5 process" (Tr. p. 184; Dist. Ex. 4).

task, requiring closer support and structure from the examiner (*id.* at pp. 6, 11). The student responded well to structure, support, breaks and small tangible rewards (*id.*). The private neuropsychologist assessed the student's attention and emerging executive functioning skills by administering selected subtests from the WPPSI-IV and NEPSY-II, results of which indicated that the student's overall working memory skills were in the average range (58th percentile) and his processing speed performance was in the high average range (84th percentile) (*id.* at p. 10).<sup>35</sup> The student performed in the very high range (91st percentile) on a measure of his self-regulation ability and the private neuropsychologist reported that he followed directions "nicely and appeared motivated to perform well" (*id.* at p. 10).

Turning to the March 2018 private neuropsychological report of the student's social/emotional performance, administration of the social perception task from the NEPSY-II yielded a score within the high average range (75th percentile) (Parent Ex. G at p. 12). The Behavioral Assessment System for Children, Third Edition (BASC-3) completed by the student's mother and pre-kindergarten teacher assessed the student's social/emotional, behavioral and adaptive functioning within the home and school environments (*id.* at pp. 4, 11). The parent reported clinically significant signs of inattention, hyperactivity/impulsivity, aggressive behavior, and depressive symptomatology, and at-risk problems with adaptability, social skills, activities of daily living, and functional communication (*id.* at p. 11).<sup>36</sup> The parent further indicated that the student wanted to have friends but that he at times exhibited "control issues," lacked patience with himself and others when in challenging situations, and lashed out and became unwilling to communicate (*id.* at p. 12). According to the parent, the student's "speech issues" negatively affected those situations and resulted in low self-esteem and negative self-statements (*id.*). On the BASC-3 the student's teacher reported no clinically significant or at-risk concerns, suggesting that the student presented as a well-adjusted student within the classroom setting (*id.*). The teacher reported that the student was a "happy-go-lucky child who enjoy[ed] coming to school every day" and who had a positive approach to learning, enjoyed participating, shared experiences, played well with peers, and was curious, imaginative, independent, and followed through with class routines and multi-step tasks with minimal teacher support (*id.*). Regarding the student's social/emotional and behavioral functioning the private neuropsychologist concluded that the student presented as a curious and eager child who wanted to connect with his peers, but that his communication and self-regulation vulnerabilities sometimes interfered with his social interactions without direct support (*id.* at p. 13). Recommendations from the report included that the student receive small group and/or that he attend a structured social skills group on a 12-month basis to "improve upon his social confidence and social communication skills, as well as his ability to cope and adapt to situations that may be unpredictable and cause him frustration" (*id.* at p. 14).

The April 2018 IEP present levels of performance reflect information about the student's social/emotional skills and needs from previously discussed private and district reports (compare Dist. Ex. 18 at pp. 4-5, with Parent Ex. G; Dist. Exs. 3; 4; 5; 8; 15). According to the IEP, the student needed to practice how to compromise and negotiate with peers when he doesn't get what

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<sup>35</sup> The private neuropsychologist characterized the student's average-range performance on the working memory assessment as suggestive of "an area of weakness within his cognitive profile" (Parent Ex. G at p. 10).

<sup>36</sup> The private neuropsychologist reported that "[o]f note, the F-Index was elevated on [the parent's] questionnaire, which may suggest[] that she responded in an overly negative manner" (Parent Ex. G at pp. 11, 19).

he wants, although that skill had "greatly improved" (Dist. Ex. 18 at p. 5). The student also needed assistance in strengthening his coping strategies when he is anxious or when he made mistakes, although the IEP indicated that was "rarely needed in school" (*id.*). At the time the IEP was developed, the student "rarely shut[] down when he [felt] unable to complete a task, but he continue[d] to need to learn to verbally communicate his feelings, especially of frustration" (*id.*). The IEP reflected the parent's report that the student sometimes had negative thoughts about going to school, and that he appeared to have difficulty talking about "upsets with his friends" (*id.*). Additionally, the IEP reflected the parent's concerns about the student's ability to socialize with peers due to his communication difficulties, which may result in "one-sided conversations, social misunderstandings and shutting down" (*id.*).

The April 2018 CSE meeting minutes indicated that the school counselor reported that she worked with the student twice weekly for 45-minute push in and pull out sessions and that the student was good at and wanted to express his feelings, had learned to follow game rules, held back and forth conversations, and compromised during play time with peers (Dist. Ex. 20 at pp. 2-3). According to the school counselor, the "biggest area" addressed was the student's dislike of when his friends did not like his ideas, an area that she addressed by using a chart showing what it meant to "work it out" (*id.* at p. 3). The meeting minutes indicated that the teacher reported that the student was doing a "great job" and there were no "meltdowns," but that he struggled with compromises as did "most kids his age" (*id.*). During the CSE meeting, according to the minutes, the parent brought forth her concerns about the student becoming frustrated when he was not understood and one-sided conversations, to which the school counselor reported that during choice time when the student got frustrated his conversations usually flowed well, and the teacher agreed (*id.*). The meeting minutes reflected the private neuropsychologist's comment that the student did not have "too many problems socially except problems in communication which can lead to difficulties with peers and he will shut down" (*id.*).

The district school psychologist—who conducted the April 2018 classroom observation and had been in the student's class "many times"—testified that with respect to the student's social/emotional development the student was a leader in the class, happy, well-liked, well-behaved, followed the rules, was social, played and engaged in activities, was participatory, and curious (Tr. p. 92; *see* Tr. p. 105; Dist. Ex. 13). She indicated that the parent was concerned about the student shutting down due to difficulty communicating, but that district staff did not observe any shutting down behavior in the school setting (Tr. p. 93). Further, the school psychologist testified that she approached every specialist who saw the student in-school to see how they perceive him, and all responded he was like a "typical pre-k kid" (*id.*). She stated that the student did not present with behavioral issues beyond those of a typical five-year old, and that he followed the rules, was compliant, did what he was supposed to do, and had friends (Tr. pp. 188-89). According to the school psychologist, the student's IEP annual goal to use strategies to encourage positive self-talk and work through negative feelings was a very typical emotional response for kids and although she did not believe the student needed it, the CSE recommended counseling "because it was important to the parents" (Tr. pp. 90-91; *see* Dist. Ex. 18 at p. 9). The April 2018 IEP also included an annual goal to improve the student's use of coping strategies when he is faced with frustration, anxiety, or upset (Dist. Ex. 18 at p. 8).

The April 2018 CSE meeting minutes reflected the school counselor's recommendation of one 30-minute group session per week of counseling, which she opined was sufficient because

"[k]indergarten has a lot of socialization and choice time" (Dist. Ex. 20 at pp. 4-5; see Dist. Ex. 18 at p. 9). The meeting minutes also indicated that the school psychologist stated that two sessions per week of counseling was for more emotionally troubled students and noted that the student had met most of his social/emotional goals (Dist. Ex. 20 at p. 5).

The IHO's decision reflected the April 2018 CSE's finding that the student "manifest[ed] very few unusual management needs in school and [was] functioning well in his pre-k class" and its provision that the student receive counseling services (IHO Decision at p. 12; Dist. Ex. 18 at pp. 6, 9). Review of the hearing record supports the IHO's determination on this issue, and I therefore decline to reverse the IHO's finding that the district offered the student a FAPE for the 2018-19 school year on that basis.

## **VII. Conclusion**

The hearing record in this matter included a significant amount of documentary and testimonial evidence about the student from a variety of sources that the April 2018 CSE considered when making its recommendations for the 2018-19 school year. As reported by the student's teacher and related service providers, the student had made significant progress during the 2017-18 school year and he was functioning well within the general education classroom setting, such that the modifications to the frequency, duration, and grouping of related services were warranted and the parents' claims to the contrary are unfounded. Likewise, as discussed above, the parents' claim that the student required a special class in a special school in order to make progress is not supported by the hearing record. While the parents desired a more restrictive placement than a general education class with related services and I understand that they had the their child's best interests at heart, the programming and placement in the April 2018 IEP, at the time it was formulated, was reasonably calculated to enable the student to receive educational benefits in a lesser restrictive environment as required by the IDEA and the IHO's decision must be upheld.

Having determined that the evidence in the hearing record establishes that the IHO correctly determined that the district offered the student a FAPE in the LRE for the 2018-19 school year, the necessary inquiry is at an end. In light of this determination, I need not address the parties' remaining contentions.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
February 28, 2020**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**