The University of the State of New York

The State Education Department
State Review Officer
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No. 21-016

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Mitchell L. Pashkin, Esq.

Law Offices of H. Jeffrey Marcus, PC, attorneys for respondents, by Vanessa Jachzel, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to fund the costs of services that respondents (the parents) obtained for their daughter beginning in June 2020 and ordered that the district's Committee on Special Education (CSE) make specific recommendations at its next meeting. The parents cross-appeal from that portion of the IHO's decision which denied their request for reimbursement for the costs of services that they obtained for their daughter during the 2018-19 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local 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

For the 2018-19 school year (kindergarten), the parents unilaterally placed the student in a nonpublic school (NPS) where he received 1:1 instruction using applied behavior analysis (ABA) in a class with a student-to-adult ratio of 6:1+3 and related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and art therapy (see Parent Ex. M at pp. 1, 6, 10, 12, 14; Dist. Ex. 1 at p. 3). In addition, the student received three 30-minute sessions of private

speech-language therapy per week using the PROMPT method (hereinafter referred to as "PROMPT services" (see Parent Ex. P; Dist. Ex. 5 at p. 2).[1]

In October 2018, the parents filed a due process complaint notice in a different proceeding alleging that the district denied the student a free appropriate public education (FAPE) for 2018-19 school year (2018-19 proceeding) (see Dist. Ex. 1). For relief, the parents requested district funding of the parents' unilateral placement of the student at the NPS for the 2018-19 school year and for independent educational evaluations (IEEs), including a neuropsychological evaluation and speech-language, OT, and PT evaluations (id. at pp. 6-7).

While the proceeding was pending, the parents indicated that a CSE convened on April 11, 2019 and recommended that the student attend a 6:1+1 special class in a district specialized school (see Parent Ex. X at p. 1).[2] On May 1, 2019, the parents executed an enrollment contract for the student's attendance at the NPS for the 2019-20 school year (first grade) (see Parent Ex. I).

After the April 2019 CSE and subsequent unilateral placement of the student, an IHO issued a final decision in the 2018-19 proceeding on June 12, 2019 (see Parent Ex. B). The IHO in that matter found that the district conceded it denied the student a FAPE, that the parents demonstrated the unilateral placement was appropriate, and that equitable considerations weighed in favor of an award of tuition reimbursement (id. at p. 7). The IHO noted that, since neither party presented evidence during the impartial hearing regarding the parents' request for IEEs and since the district had updated "project reports" from OT, PT, and speech-language "evaluators," IEEs were "not necessary to determine the appropriate services and placement" for the student (id. at p. 8).[3] The IHO ordered the district to fund the student's unilateral placement at the NPS for the 2018-19 school year (id.).

In a letter dated June 17, 2019, the parents notified the district of their intent to unilaterally place the student at the NPS for the 2019-20 school year and seek public funding for the costs thereof (Parent Ex. X at p. 1). The parents asserted that the April 2019 CSE's recommendations were insufficiently supportive to address the student's needs and that the CSE ignored the parents and providers recommendations that the student continue in a more supportive setting with 1:1 ABA based instruction (id. at p. 2). Further, the parents contended that they requested the CSE include PROMPT services on the student's IEP or, alternatively, that the district reimburse the parents for PROMPT services, but that the CSE did not respond to the request (id.). Finally, the parents asserted that, as of the date of their letter, they had not received a copy of the IEP developed

[1] PROMPT is an acronym for "Prompts for Restructuring Oral Muscular Phonetic Targets" (Parent Ex. T at p. 2; Dist. Ex. 5 at p. 1). PROMPT is a motor-based speech-language therapy treatment approach used to assist children with motor speech disorders and motor planning difficulties (Parent Exs. N at pp. 2-3; T at p. 2; Dist. Ex. 5 at pp. 1-2).

[2] A copy of the April 2019 IEP was not entered into evidence during the impartial hearing in this matter.

[3] The IHO did note that the district "might consider formal evaluations" prior to making recommendations for the student for the 2019-20 school year (Parent Ex. B at p. 8).

at the April 2019 CSE meeting or notice of the particular assigned public school site to which the district assigned the student to attend for the 12-month 2019-20 school year (id.).

A. July 2019 Due Process Complaint Notice

By due process complaint notice dated July 1, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year (see Parent Ex. A). The parents requested pendency based on the unappealed IHO decision that ordered the district to fund the costs of the student's attendance at the NPS for the 2018-19 school year (id. at pp. 2-3).

Initially, the parents requested reimbursement for the unilaterally-obtained PROMPT services that the student received during the 2018-19 school year (Parent Ex. A at p. 4). The parents contended that, not only did "[t]he CSE" fail to recommend PROMPT services for the 2018-19 school year, it did not recommend any other services that could have adequately addressed the student's apraxia (id.).

Turning to the 2019-20 school year, the parents argued that the district failed to evaluate the student in all areas of suspected disability as the district failed to assess the student's cognitive, educational, speech-language, gross-motor, fine-motor, sensory, and behavioral needs (Parent Ex. A at p. 3). Specifically, the parents contended that the district should have conducted a "comprehensive speech-language evaluation to assess whether [the student] ha[d] Apraxia of Speech" (id.). Additionally, the parents argued that the district should have completed a functional behavioral analysis (FBA) and developed a behavioral intervention plan (BIP) (id.).

The parents contended that the April 2019 CSE failed to recommend an appropriate program for the student for the 2019-20 school year (Parent Ex. A at p. 3). The parents asserted that the recommended 6:1+1 special class would not have "enable[d] [the student] to attend to academic activities and make meaningful progress" (id.). Moreover, the parents alleged that the CSE failed to include PROMPT services on the student's IEP as requested by the parents (id.). Finally, the parents asserted that the district had not provided the parents with a copy of the April 2019 IEP or with notice as to what public school site the district had assigned the student to attend for the 12-month 2019-20 school year (id.).

For relief related to the 2019-20 school year, the parents requested the district fund the student's placement at the NPS, reimburse them for the costs of after-school PROMPT services that the student received during the 2019-20 school year, and fund independent educational evaluations (IEEs), including a neuropsychological evaluation, a speech-language evaluation, an OT evaluation, and a PT evaluation (Parent Ex. A at p. 4).

B. Events Subsequent to July 2019 Due Process Complaint Notice

The student began attending the NPS for the 2019-20 school year on July 1, 2019 and continued to receive 1:1 instruction using ABA in a class with a ratio of 6:1+3 as well as related services of speech-language therapy, OT, PT, and art therapy (see Parent Exs. G; L at pp. 1, 5, 9, 11, 12). In addition to the private school programming, the student continued to receive privately-obtained PROMPT services in his home three times weekly (see Parent Exs. N at p. 1; Q).

In a school location letter dated August 6, 2019, the district notified the parents of the particular public school site to which it assigned the student to attend for the 2019-20 school year (Parent Ex. D at p. 1). In a prior written notice also dated August 6, 2019, the district summarized the recommendations of the April 2019 CSE that that student attend an extended school year program in a 6:1+1 special class placement in a specialized school and receive support from an individual paraprofessional for orientation and mobility, assistive technology (tablet), OT, PT, and speech-language therapy, and that the parents receive parent counseling and training (id. at p. 2). The prior written notice indicated that the April 2019 CSE had reviewed a May 3, 2018 classroom observation, a February 5, 2018 social history update, and an April 11, 2019 teacher report (id. at p. 3).

The parties proceeded to impartial hearing on the July 1, 2019 due process complaint notice. Following a pre-hearing conference on August 22, 2019, a hearing on the issue of pendency was held on August 27, 2019 (Tr. pp. 1-13). The district did not appear at the pendency hearing (Tr. p. 9). On August 27, 2019, the IHO issued an interim decision regarding the student's stay-put placement, which directed the district to continue to fund the student's tuition at the NPS during the pendency of the proceedings, effective July 1, 2019 (Aug. 27, 2019 Interim IHO Decision at p. 3).

A private speech-language evaluation of the student was conducted on January 21, 2020 (Parent Ex. N at p. 1). The speech-language pathologist who conducted the evaluation indicated the student was not yet able to access the motor speech skills necessary to use verbal language in a consistent manner (id. at p. 2). The speech-language pathologist opined that the student required "treatment which addresses and supports his motor-speech skills for him to reach his full potential" (id.). The speech-language pathologist indicated that the student would benefit from a multi-sensory technique to help him develop functional, verbal language and that PROMPT services would "help the student to use his motor-speech skills in order to communicate his basic needs and wants" (id. at pp. 2-3). The speech-language pathologist recommended that, in addition to school-based speech-language therapy, the student would benefit from intensive, individual PROMPT services three times per week for 45-minutes a session (id.).

Shortly after schools closed in March 2020 due the COVID-19 pandemic, the educational director of the NPS indicated in a letter directed "[t]o whom it may concern" dated July 1, 2020 that the student had not received any live remove learning sessions since the school closure "due to his inability to attend to the screen" but that he received videos twice a week from his occupational therapist and three times a week from his speech-language therapist (Dist. Ex. 4). In addition, the educational director indicated that the school sent "videos and resources" to the parents and communicated whenever possible (id.).

Five additional hearing dates took place between October 3, 2019 and August 5, 2020, at which the parties updated the IHO as to the status of settlement negotiations (see Tr. pp. 14-44).

C. August 2020 Due Process Complaint Notice

The parents filed another due process complaint notice, dated August 5, 2020, alleging that the district failed to offer the student a FAPE for the 2019-20 school year, and requested that it be consolidated with their July 2019 due process complaint notice (Parent Ex. C at pp. 1-2).

The parents contended that the district failed to provide them with a copy of the IEP developed at the April 2019 CSE meeting even after they provided the district with notice of their intent to unilaterally place the student and filed their July 2019 due process complaint notice (Parent Ex. C at p. 3). The parents asserted that they did not receive a school location letter until after the 2019-20 school year had started and that they were unable to visit the recommended school until September 2019 (id.). Also, the parents argued that the public school site to which the district assigned the student to attend for the 2019-20 school was not available and inappropriate (id.).

The parents asserted that the April 2019 CSE failed to consider a full spectrum of special education placements options for the student (Parent Ex. C at p. 3). The parents noted that the August 2019 prior written notice indicated that the only alternative placement considered was an 8:1+1 special class but that the student still required the same level of support that he was receiving from the NPS (id. at pp. 3-4). The parents contended that the CSE should have considered recommending a State-approved nonpublic school but failed to do so (id. at p. 4). Next, the parents alleged that the August 2019 prior written notice was inadequate because it failed to provide required information, such as the factors relevant to the proposed or refused action, including factors underlying the recommendation for a 6:1+1 special class in a specialized school and factors underlying the determination not to recommend PROMPT services, despite the parents request therefor at the April 2019 CSE meeting (id.).

Relating to the pending proceeding, the parents asserted that the district failed to hold a resolution session or file a response to the parents' July 2019 due process complaint notice (Parent Ex. C at p. 4). Moreover, the parents contended that the district failed to automatically implement pendency (id.). The parents alleged that, even after the IHO's August 2019 interim decision on pendency was issued, the district "continued to neglect its obligation to fund the student's pendency placement" as the district still had not paid for the summer 2019 school session and the services provided by the NPS in March and April 2020 (id.). The parents indicated that the district had "refused to make any pendency payments for the remote learning program subsequent to the COVID-19 related school closure" (id.).

The parents reiterated claims relating to the district's failure to the evaluate the student (compare Parent Ex. C at p. 4, with Parent Ex. A at p. 3). The parents contended that they requested evaluations during both the 2018-19 and 2019-20 school years "by way of filing due process complaints" and the district ignored those requests, failing to complete any evaluations (Parent Ex. C at p. 5). The parents noted that they obtained the January 2020 private speech-language evaluation at their own expense and requested that the district be required "to develop an appropriate IEP that would include" the recommended after-school PROMPT services (id.).

Finally, the parents asserted that the a CSE had not timely convened to conduct the student's annual review by April 11, 2020 (Parent Ex. C at p. 5).

For relief, the parents requested in their August 2020 due process complaint notice that the district reimburse them for the costs of the January 2020 speech-language IEE (Parent Ex. C at p. 5). Further, the parents requested the district fund an FBA by a private evaluator of the parents' choosing (id. at p. 6). Next, the parents sought an order directing the district to reconvene the CSE to develop an IEP that addressed the parents' concerns and included 1:1 ABA instruction and three

45-minute sessions of after-school PROMPT services (id.). Finally, the parents requested "compensatory relief for the denial of a FAPE in an amount and of a type that the [IHO] finds to be just and proper" (id.).

D. Impartial Hearing Officer Decision

In an interim decision dated August 12, 2020, the IHO consolidated the July 1, 2019 and August 5, 2020 due process complaint notices (see IHO Ex. I). An eighth and final hearing date took place on September 22, 2020 (see Tr. pp. 45-69). At impartial hearing, the district conceded that it did not offer the student a FAPE but indicated that it was objecting to the parents' requested relief (Tr. p. 58). Specifically, the district argued that the parents' request for reimbursement of PROMPT services delivered to the student during the 2018-19 school year war barred by res judicata and that the tuition for the student's attendance at the NPS during the 2019-20 school year should be reduced since the student was "unable to particulate to any meaningful extent during remote learning" (id.).

The IHO rendered a decision on December 7, 2020 (see IHO Decision at p. 23). First, regarding the 2018-19 school year, the IHO denied the parents' request for reimbursement of the costs of private PROMPT services delivered to the student as barred by the doctrine of res judicata (id. at p. 17). The IHO noted that the parents filed an October 2018 due process complaint notice, alleging that the district failed to offer the student a FAPE for the 2018-19 school year, and could have but did not request reimbursement for the PROMPT services (id. at pp. 17-18). The IHO determined that the parents' claim underlying their request for the 2018-19 PROMPT services sessions arose from the same nucleus of operative facts as the claims set forth in the parents' October 2018 due process complaint notice and, as such, the parents had a full and fair opportunity to raise that issue in the 2018-19 proceeding but did not do so (id. at p. 18). Additionally, the IHO indicated she did "not find it credible that the parents were waiting to see if the therapy was 'effective' before asking for reimbursement" and that reimbursement was not appropriate compensatory relief (id. at p. 19).

The IHO determined that the district did not meet its burden to prove that it offered the student a FAPE for the 2019-20 school year (IHO Decision at p. 7). As for the appropriateness of the unilateral placement, the IHO found that the 12-month program at the NPS, including 1:1 instruction using ABA methodology, was appropriate for the student for the 2019-20 school year (id. at p. 13). The IHO also found that equitable considerations weighed in favor the parents' request for tuition reimbursement (id. at pp. 20-21). Regarding the district's argument that tuition should be reduced because the student was unable to participate in remote learning, the IHO found that "it was not surprising that [the student] was unable to participate in remote learning" and that "the testimony showed that, under the circumstances – an unprecedented and unpredictable nationwide health crisis – the alternate program developed by the school was 'specially designed' to meet his 'unique needs' in light of the circumstances" (id. at p. 15). Thus, the IHO found that there was no reason to reduce the amount of tuition to be reimbursed due to the instruction delivered to the student during the COVID-19 closure period (id.). In addition, the IHO held that the parents were entitled to reimbursement for the costs of PROMPT services that the student received during the 2019-20 school year (id. at p. 19). The IHO also ordered the district to reimburse the parents for the costs of PROMPT services obtained for the student beginning in June 2020 until the district re-convened the CSE and added the services to the student's IEP (id.). The

IHO held that, as of the date of her decision, the frequency of the services that the district would be responsible to fund or provide should be increased from three 30-minute sessions to three 45-minutes 1:1 sessions per week (id.).

Finally, the IHO found that the parents were entitled to the requested IEEs at public expense, specifically: reimbursement for the January 2020 speech-language evaluation and funding for an independent neuropsychological evaluation, an independent OT evaluation, an independent PT evaluation, and an independent FBA (IHO Decision at pp. 19-20). Further, the IHO directed the CSE to reconvene "to develop an IEP consistent with the evaluation reports" and include recommendations for a 12-month program with 1:1 ABA instruction and three 45-minute sessions of 1:1 PROMPT services per week to be delivered in the student's home (id. at p. 20).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in granting certain relief to the parents. Specifically, the district argues that the IHO erred in ordering it to fund the student's after-school PROMPT services beyond the 2019-20 school year and in ordering prospective relief in the form of requiring specific recommendations for the student's IEP going forward. Regarding the IHO's order for district funding of PROMPT services beyond the 2019-20 school year, the district contends that IHO's award amounted to an award of compensatory education, which was not appropriate given that the IHO had already awarded reimbursement for the student's tuition at the NPS and the costs of PROMPT services that the student received during the 2019-20 school year as remedies for the district's denial of a FAPE for the 2019-20 school year. Moreover, the district argues that the IHO exceeded her jurisdiction in awarding this relief because the parents did not request it in the due process complaint notice. Additionally, the district contends that it was improper for the IHO to order the CSE to develop a new IEP for the student with specified recommendations such as a program with 1:1 ABA instruction and after-school 1:1 PROMPT services. The district argues that it was inappropriate for the IHO "to mandate the contents of an IEP for a future school year based on the appropriateness of the program or services by a student in a prior school year."

In an answer with cross-appeal, the parents respond to the district's appeal with admissions and denials and argue that those portions of the IHO's decision awarding reimbursement for PROMPT services from June 2020 going forward and ordering specific IEP amendments be upheld. In addition, the parents argue that the district failed to raise arguments made in the request for review during the impartial hearing and that, therefore, the arguments should be deemed waived. In a cross-appeal, the parents argue that the IHO erred by finding that the doctrine of res judicata barred their request for reimbursement for PROMPT services that the student received during the 2018-19 school year.

In the answer to the cross-appeal, the district responds to the parents' appeal and request that the IHO's determination regarding the parents' requested relief for the 2018-19 school year be upheld.[4]

[4] The parents served and filed a reply to the district's answer to the cross-appeal. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed" in the request for

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

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review or the cross-appeal" or "to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions-precedent triggering the parents' right to file a reply. As such, the parents' reply fails to comply with the practice regulations and will not be considered.

must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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).

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

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. Scope of Review

Neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year, that the parents were entitled to reimbursement for the costs of the student's attendance at the NPS and of the student's PROMPT services that the student received during the 2019-20 school year, and that the student was entitled to IEEs at district expense. Therefore, the IHO's determinations on these issues have become final and binding on both parties and they will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. 2018-19 School Year—PROMPT-Based Speech-Language Therapy Services

Turning first to the parents' cross-appeal of the IHO's determination that their request for reimbursement of PROMPT services that the student received during the 2018-19 school year was barred by res judicata, the parents contend that they did not request the services at the May 2018 CSE, which was the subject of the 2018-19 proceeding, and they could not have requested reimbursement or the provision of such services in the October 2018 due process complaint as there was no clinical evaluation to support the appropriateness of the service at that time. The parents contend that they requested reimbursement for these services at the April 2019 CSE meeting, which took place during the 2018-19 school year. As such, the parents argue that basis for their request for reimbursement of the PROMPT-based speech-language therapy services did not arise from the same the nucleus of facts as those underlying their October 2018 due process complaint notice.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]).

The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon,

2006 WL 3751450, at *6).[6] Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

The student received three 30-minute sessions per week of PROMPT services during the 2018-19 school year (see Parent Exs. P; W at p. 3; Dist. Ex. 5 at p. 2). The parents' due process complaint notice regarding the 2018-19 school year set forth allegations challenging the recommendations of a CSE that took place on May 11, 2018 as well as the appropriateness and availability of the particular public school site to which the district assigned the student to attend for the 2018-19 school year (see Dist. Ex. 1 at pp. 2-6). The October 2018 due process complaint notice did not request reimbursement for PROMPT services; however, it did mention that the parents had already obtained home-based PROMPT services for the student from a speech language therapist during the preceding 2017-18 school year (id. at pp. 2, 6-7). The claims regarding the 2018-19 school year then went on to be fully litigated and concluded with an IHO decision dated June 12, 2019 (see Parent Ex. B).

In the present matter, the parents based their request for reimbursement for the PROMPT services delivered during the 2018-19 school year on their allegation that "[t]he CSE failed to recommend the provision of PROMPT services for the 2018-19 school year" (Parent Ex. A at p. 4). The parents did not specify to which CSE meeting they referred (see id.). Elsewhere in the June 2019 due process complaint notice, the parents allege that they requested that the April 2019 CSE include PROMPT services on the student's IEP or, alternatively, that the district reimburse the parents for after-school private PROMPT services (id. at p. 3).

Initially, the parents' argument that the claim underlying their request for PROMPT services did not become ripe until the April 2019 CSE meeting also defeats their request for reimbursement for PROMPT services for period of September 2018 through at least April 2019.[7] If the parents do not challenge that the CSE should have recommended PROMPT services on the student's IEP that was operative for the majority of the 2018-19 school year, it is unclear on what basis the parents believe the district should be required to reimburse the parents for the private services. The documentation supporting the appropriateness of PROMPT services for the student

[6] While the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]). It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

[7] Specifically, the parents argue that they "could not have properly requested after-school PROMPT services, or reimbursement for such services at the hearing arising from the October 2018 [due process complaint notice], as the [May 2018] CSE was never asked to provide that service, and the Parents had no clinical evaluation to support its appropriateness at hearing" (Answer & Cr.-Appeal ¶ 13). However, I do not find that argument convincing because the parents explained in their October 2018 due process complaint notice that the home-based speech-language therapist had already been using PROMPT with the student as early as 2017-18 school year (Dist. Ex. 1 at p. 2). Their claim against the district was ripe when they initiated the 2018-19 proceeding challenging the May 2018 CSE determinations, and they cannot interpose new challenges to those determinations in a second proceeding when they should have brought them in the first proceeding.

obtained after the May 2018 CSE meeting cannot support a finding that the May 2018 IEP was inappropriate (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). To the extent the parents attempt to rely on the district's alleged failure to evaluate the student's speech-language needs leading up to the 2018-19 school year, there is no question that the sufficiency of the district's evaluations was raised and fully adjudicated during the 2018-19 proceeding and is barred by res judicata (see Parent Ex. B at p. 8; Dist. Ex. 1 at pp. 3, 7). The parents may not revive that claim in the present matter in order to seek additional relief for the same underlying violation.

Based on the foregoing, there is insufficient basis to reverse the IHO's determination that res judicata applies to bar the parents' request for reimbursement for the costs of PROMPT services delivered to the student during the 2018-19 school until April 2019 as the prior proceeding involved adjudication on the merits, involved the same parties, and any claim underlying the request for reimbursement of private PROMPT services from July 2018 through April 2019 could have been raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

With that said, the CSE's recommendations in the April 2019 IEP are indisputably the subject of the present matter, including the lack of a recommendation for PROMPT services at that time (see Parent Ex. A at p. 3), yet the district failed to offer into evidence a copy of the April 2019. Absent a copy of the IEP it is unknown what the CSE contemplated as an implementation date for the April 2019 IEP, and the parents could not have challenged that the April 2019 IEP in their October due process complaint notice. As the district conceded that it denied the student a FAPE for the 2019-20 school year in the face of allegations that the April 2019 IEP was not appropriate and did not contest the appropriateness of the private PROMPT services obtained by the parents, the evidence in the hearing record supports a finding that the parents are entitled to reimbursement for private PROMPT services delivered during the 2018-19 school year after April 11, 2019.[8]

[8] Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th

C. 2019-20 School Year—Prospective Relief

As noted above, the IHO ordered the district to fund three 30-minute sessions of PROMPT services as of June 2020 through the date of the IHO's December 2020 decision, and three 45-mintue sessions per week thereafter until the CSE reconvened and place PROMPT services on the IEP (IHO Decision at pp. 19, 22). In addition, the IHO ordered the CSE, upon reconvene, to recommend a school program for the student to include 1:1 instruction using ABA and three 45-minute sessions of after-school PROMPT services (id. at pp. 19, 23). On appeal, the district challenges this relief ordered by the IHO. The district asserts that the IHO erred in granting prospective relief in addition to reimbursement for tuition at the NPS and for private PROMPT services delivered during the 2019-20 school year to remedy the district's failure to offer the student a FAPE for the 2019-20 school year. The district contends that the IHO inappropriately ordered prospective relief for a school year not at issue. The district asserts that the IHO "essentially usurped the CSE's ability to develop an appropriate IEP based on its own independent review of evaluative material." Although, the district acknowledges that the student benefitted from PROMPT services, it maintains that "the IHO erred in ordering that the therapy continues into the following school year without any other basis in the record to do so." Further, the district contends that the IHO's order that the CSE recommend the student receive ABA "conflicts with the fact that an IEP normally is not required to require the use of a specific methodology."[9]

An award of prospective placement or services for a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a

Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]). While the parents' 10-day notice alerting the district to their intent to unilaterally place the student at the NPS and obtain private after-school PROMPT services for the 2019-20 at district expense was dated June 17, 2019 (Parent Ex. X at p. 1), the parents specifically allege that they requested reimbursement for private PROMPT services at the April 2019 CSE meeting (Parent Ex. A at p. 3). While it is unclear from the hearing record whether the parents' request in this regard was specifically intended to provide the district with notice of their intent to seek reimbursement for private PROMPT services delivered during any portion of the 2018-19 school year, absent any evidence or argument from the district on this point, I decline to weigh equitable considerations relating to such notice against the parents in this instance.

[9] The district also argues that the parents did not request relief beyond the 2019-20 school year in their due process complaint notices. However, in their August 2020 due process complaint notice, the parents specifically requested an order that the CSE develop an IEP to include 1:1 ABA and after-school PROMPT services and sought "compensatory relief" (Parent Ex. C). This was sufficient to put the district on notice that relief awarded could be prospective in nature. Relatedly, the parents argue that the district waived any arguments disputing prospective relief since it did not state its positions during the impartial hearing; however, the district was not required to preserve these types of arguments in order to allege on appeal that the relief awarded by the IHO was legally or factually inappropriate.

student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

1. Prospective District Funding of Private PROMPT-Based Speech-Language Therapy

As discussed above, the parents July 2019 and August 2020 due process complaint notices set forth claims specific to the student's 2019-20 school year, as well the 2018-19 school year to the extent discussed above (see Parent Exs. A; C). In a separate proceeding the parents have challenged the district's offer of a FAPE to the student for the 2020-21 school year (2020-21 proceeding) (see Dec. 1, 2020 Due Process Compl. Notice; Dec. 8, 2020 Interim IHO Decision [denying consolidation]). According to the parents' December 2020 due process complaint notice, the district had not convened a CSE since April 2019 (see Dec. 1, 2020 Due Process Compl. Notice at p. 2). In the 2020-21 proceeding, the parents sought, among other things, that the district reimburse them for the costs of the student's tuition at the NPS and private PROMPT services delivered during the 2020-21 school year (id. at p. 4).

Regarding private PROMPT services, it is a more appropriate course to limit review to remediation of past harms that have been explored through the development of the underlying hearing record, and it is on this record that the IHO based her now final and binding award of reimbursement for the student's tuition and PROMPT services for the 2019-20 school year. To the extent the parents remain displeased with the CSE's recommendations (or lack thereof) for the student's program for the 2020-21 school year, they may pursue appropriate relief in the 2020-21 proceeding challenging the district's determinations in that school year (see Eley, 2012 WL 3656471, at *11 [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

2. IEP Amendments

In this matter, the IHO's award amounts to prospective relief in two forms: the first, as funding for privately-obtained services and the second as specific IEP amendments. As to the latter, it is far less problematic for an administrative hearing officer to direct a school district—the regulated local educational agency—to provide a student with discrete forms of services in a placement that is implemented by the public school district, such as additional instructional time in a specific subject area or additional related services to support a particular need or remediate a past deficiency (see Application of a Student with a Disability, Appeal No. 19-018). It is expected that such remedial services will be provided in a setting in which the CSE will also continue to have the responsibility to develop and implement a comprehensive IEP that takes into account all aspects of the student's needs and educational environment into account when delivering the services, and such relief is typically flexible and can be provided in a wide variety of educational placements. In contrast, relief in the form of a prospective private services is far less predictable and does not assure the presence of the same familiar mechanisms under which public school districts are required to operate.

Here, the district does not dispute and the hearing record shows that the student has benefited from PROMPT services (Req. for Rev. at p. 5).

The student is nonverbal and exhibits limited vocalizations (see Parent Ex. W at pp. 1-2). In a February 2019 speech-language progress report, the student's speech-language pathologist from the NPS indicated that the student could use vocal approximations to request desired items with minimal assistance but, when he struggled with vocalizations, used an augmentative and alternative communication (AAC) device for functional and effective communications (Parent Ex. M at p. 6). The speech-language pathologist also indicated that the student benefited from verbal and tactile cues to expand his abilities to produce vocal approximations (id. at p. 7). The speech-language pathologist noted that the student had "begun to struggle with his ability to attend and focus throughout therapy sessions" and indicated that "[a]dditional methods" were being considered to assist the student during therapy sessions (id. at p. 9).

During the impartial hearing, the district offered into evidence an affidavit from the private speech-language pathologist who delivered the student's after-school PROMPT services during the 2018-19 and 2019-20 school years (Dist. Ex. 5).[10] The private speech-language pathologist had worked with the student in early childhood until he transitioned to the Committee on Preschool Special Education and then again beginning in September 2017 (id. at p. 2). She indicated that the student presented with childhood apraxia of speech secondary to an autism spectrum disorder and struggled with motor planning for speech production (id.). The private speech-language pathologist described the PROMPT method and indicated it was "developed to assist children with motor speech disorders and motor planning difficulties" such as childhood apraxia of speech (id. at pp. 1-2). According to the speech-language pathologist, the student made progress during the 2018-19 school year in his ability to attend to short tasks, identify objects from various categories, and produce some sounds and a few simple words with decreased intelligibility, but continued to demonstrate inconsistency in his responses (id. at p. 3). The private speech-language pathologist opined that the student "benefited tremendously from receiving PROMPT therapy in addition to the school-based services" (id.). She stated that the PROMPT services were "crucial" for the student to achieve progress in his verbal communication skills given his severe deficits in his motor system (id.). She recommended that the student continue to receive three 30-minute sessions of PROMPT services after school "to improve his sound production abilities and to help him develop verbal, functional communication skills that w[ould] in turn improve his social skills" (id. at p. 4).

For the 2019-20 school year, the student's speech-language pathologist at the NPS was trained in PROMPT methods (Parent Ex. V at p. 7). According to a November 2019 progress report, the student's speech-language pathologist from the NPS began using PROMPT techniques to help the student produce vocalizations but noted that the student had "not yet adjusted to [the] therapist touching his mouth" (Parent Ex. L at p. 5).[11] According to the progress report, the student continued to rely on his AAC device for the majority of his communication (id. at pp. 7-8).

[10] It appears that the district's object in offering the speech-language pathologist's affidavit was to demonstrate that the student had been receiving private PROMPT services during the 2018-19 school year and that, therefore, the parents could have requested them as part of the 2018-19 proceeding (see IHO Ex. II at p. 3). Ultimately, however, the affidavit tends to support the parents' assertion that the student benefited from PROMPT services (see Dist. Ex. 5).

[11] A February 2020 progress report had a similar report (see Parent Ex. K at p. 5). As of the June 2020 progress report, due to the COVID-19 pandemic, the school-based speech-language therapy consisted of the student

A private speech-language pathologist conducted the January 2020 speech-language IEE of the student, which consisted of administration of two informal assessment PROMPT tools: the Global Domain Evaluation and The System Analysis Observation (Parent Ex. N at p. 1). The evaluating speech-language pathologist indicated that the student presented with severe deficits across PROMPT domains (id.). Specifically, she reported that the student demonstrated "significant impairments with his motor speech control at all levels including control of phonation, jaw, lips, tongue, sequencing, and prosody as well as high narrow palatal arch" (id.). She indicated that the student did not demonstrate any independent motor control at higher levels such as labial-fatigue, lingual, or sequencing and had a significantly reduced ability to imitate simple speech-motor actions (id. at pp. 1-2). In the social-emotional domain, the evaluating speech-language pathologist indicated that the student lacked language and speech-motor skills to communicate effectively with a partner which might be frustrating to him (id. at p. 2). In the cognitive linguistic domain, the speech-language pathologist stated that the student presented with impaired attention and self-regulation, benefited from sensory input as a calming support, and demonstrated a gap between his receptive and expressing language skills, with the former being relatively stronger (id.). Despite the relative strength in receptive language, the speech-language pathologist indicated the student did not consistently answer basic yes/no questions or follow directions (id.). Regarding expressive language, the speech-language pathologist reported that the student did not spontaneously use any functional verbalizations or word approximations, used some vocalizations as "vocal stims," not for communication, and did not attempt to access his AAC device although it was available (id.).

The evaluating speech-language pathologist reviewed the student's then "current IEP" and indicated that it covered general aspects of communication but did not address motor speech skills (Parent Ex. N at p. 3). In order to address the student's needs, the evaluating speech-language pathologist recommended that the student receive intensive individualized PROMPT-based speech-language therapy three times per week for 45-minute 1:1 sessions (id.). The speech-language pathologist opined that it was critical for the student "to receive comprehensive treatment such as PROMPT, to help him vocalize more frequently and easily in his environment, increasing his functional communication for academic and personal needs" (id.).

At the end of the 2019-20 school year, the student's private speech-language pathologist completed a progress report that indicated the student made progress in receptive and expressive language skills (Parent Ex. R). She detailed that the student had made progress in his ability to follow simple commands, identify and point to objects, and play skills (id. at p. 1). With regard to the student's "communicative intent," the speech-language pathologist indicated the student had been trying to communicate and approximate words but that he encountered difficulty motor planning and sequencing speech movements (id. at p. 2). She reported that the student had made progress blowing, which was practiced in order to learn to sustain respiration necessary for speech production, and was inconsistently beginning to tolerate prompts used for jaw control and imitating some word approximations (id.). The private speech-language pathologist recommend that the

receiving recorded videos with suggested activities to address his speech-language delays (see Parent Ex. J at p. 6).

student continue to receive PROMPT services three times weekly but at an increased during of 45 minutes per session (id.).

The district did not rebut or contest the evidence supporting the student's need for PROMPT services. The district offered no evaluative information or IEPs into evidence. Rather, the only evidence regarding PROMPT services that the district did enter into evidence, supported the student's need for it (see Dist. Ex. 5 at pp. 2-4). Here, there is a clear "consensus" among those who evaluated the student regarding his needs that should be followed by the CSE (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 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]). Thus, there is insufficient basis in the hearing record to disturb the IHO's finding that student required ongoing PROMPT services and that, therefore, when it reconvenes, the CSE should place such services on the student's IEP. However, upon including PROMPT services on the student's IEP, it will be the district's obligation to implement them if and when the student attends the IEP program and placement and, unless the district agrees, the parents would not be entitled to obtain the services privately from their preferred provider. Otherwise, the parents would have to seek private PROMPT services via a unilateral placement and do so at their own financial risk.

In contrast to the evidence supporting the student's need for PROMPT services, the evidence in the hearing record does not support the IHO's order requiring CSE to place ABA methodology on the student's IEP on a going-forward basis. Unlike the PROMPT services, there are no evaluations in the hearing record to support the parents' assertion that that the student required instruction using ABA. In his affidavit testimony, the educational director of the NPS indicated that the student "required intensive, individualized ABA based instruction because of his high distractibility, difficulty with self-regulation and focus, his tendency to exhibit challenging behaviors . . . as well as his need for prompting, redirection, and sensory breaks" (Parent Ex. V at pp. 11-12). He further averred that the student required 1:1 instruction and discrete trial training to acquire and maintain skills (id. at p. 12). Beyond this conclusory statement and progress reports from the NPS reflecting that the student was placed in a special class and received ABA instruction (Parent Exs. K at p. 1; L at p. 1; M at p. 1), there is no specific documentary or testimonial evidence in the hearing record addressing why the student required ABA methodology in particular on a going forward basis versus any one of a variety of other educational strategies or methodologies for working with children with an autism spectrum disorder. In sum, unlike the discussion above involving the student's PROMPT therapy, there is not the same consensus, supported by convincing evaluative information, regarding ABA services and as such, the IHO erred in ordering the CSE to specify ABA methodology on the student's IEP.

VII. Conclusion

The IHO correctly held that the request for reimbursement of PROMPT therapy during the 2018-19 school year until April 2019 is barred by res judicata; however, the district shall be required to reimburse the parents for the costs of PROMPT services delivered to the student from April 11, 2019 through the end of the 2018-19 school year. In addition, for the reasons set forth above, the IHO erred in ordering prospective district funding of private PROMPT services delivered to the student after June 2020. As for IEP amendments, the IHO erred in ordering the

CSE to place 1:1 ABA on the student's IEP; however, there is insufficient basis in the hearing record to disturb the IHO's order requiring the CSE to place three 45-minute sessions per week of PROMPT services on the student's IEP going forward.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 7, 2020, is modified by reversing those portions which found that the parents' request for reimbursement for PROMPT services unilaterally obtained between April 2019 and the end of the 2018-19 school year was barred by res judicata, that the district was required to fund PROMPT services unilaterally obtained after June 2020, and that the CSE was required to place 1:1 ABA services on the student's IEP when it next convenes; and

IT IS FURTHER ORDERED that, upon proof of payment, the district shall be required to reimburse the parents for the costs of PROMPT services unilaterally obtained by the parents between April 2019 and the end of the 2018-19 school year.

Dated: **Albany, New York**
April 12, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER