



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-020

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the North Shore Central School District**

### **Appearances:**

Frazer & Feldman, LLP, attorneys for respondent, by Timothy M. Mahoney, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered her son an appropriate educational program for the 2020-21 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 parties' familiarity with the facts and procedural history of the case is presumed and will not be recited in detail here. Briefly, the student received an autism spectrum disorder (ASD) diagnosis at two years of age, and he was provided with occupational therapy (OT), speech-language therapy, and services using applied behavior analysis (ABA) through the Early Intervention program (IHO Ex. I at p. 6; Dist. Exs. 11 at p. 1; 13 at p. 1; see Tr. p. 242). According to a neuropsychological consult report, subsequent yet "incomplete" testing due to the student's ability to participate found him "to exhibit minimal to no symptoms of ASD," although deficits in cognitive and adaptive functioning were reported (IHO Ex. I at pp. 6-7). The neuropsychological consult report also indicated that during the 2018-19 school year the student was eligible to receive special education and related services as a preschool student with a disability and through the Committee on Preschool Special Education (CPSE) he received instruction in a 12:1+2 special

class placement together with OT, physical therapy (PT), and speech-language therapy (*id.* at p. 7). The report also indicated that administration of the Autism Diagnostic Observation Schedule, Second Edition (ADOS-2) to the student in April 2019 yielded a finding that the student "still needed 'a high level of educational support due to his symptoms'" (*id.* at p. 8).

The student moved school districts sometime around the conclusion of the 2019-20 or the beginning of the 2020-21 school year. The student began kindergarten in his new school district in fall 2019, at which time the CSE evaluated him at the parents' request (*see* Dist. Exs. 5-8). According to a psychological evaluation report conducted by the district in October 2019, the student's former public school district of residence had determined in June 2019 that he was no longer eligible for special education services (Dist. Ex. 5 at p. 1).<sup>1</sup> Following psychological, educational, OT, and speech-language evaluations, the CSE convened on December 3, 2019 for an initial eligibility meeting and determined that the student was eligible for special education and related services as a student with a speech or language impairment; recommending that he receive OT, speech-language therapy, and behavioral consultation services (Tr. p. 436; Parent Ex. L at p. 1; Dist. Exs. 5-8; 9 at p. 1).<sup>2</sup>

In January 2020 the parent obtained a private developmental pediatric evaluation of the student (Dist. Ex. 11). The developmental pediatrician concluded that the student "appear[ed] to meet criteria for a diagnosis of" ASD and attention deficit hyperactivity disorder (ADHD), combined type and provided various class placement and related services recommendations (*id.* at p. 8). According to the parent, after she received the developmental pediatric evaluation report she submitted it to the district and requested a CSE meeting to review the results (Tr. p. 421).

On January 31, 2020, the district's behavioral consultant conducted a functional behavioral assessment (FBA) of the student and on February 6, 2020 developed a behavior intervention plan (BIP) (Tr. p. 243; Parent Ex. L). Also on February 6, 2020, the CSE convened and determined that the student was eligible for special education and related services as a student with an other health impairment (Parent Ex. P at p. 1). The CSE recommended that the student continue to receive OT and speech-language therapy; increased the amount of behavior consultation services; and added social skills counseling, a sensory diet, breaks, and preferred seating to the student's IEP (Parent Exs. M at pp. 19-20; P at pp. 6-7; Q at p. 1).

At the request of the district, a psychological diagnostic evaluation of the student was conducted over two dates in March 2020 "in order to assess for the presence of [ASD]" (Dist. Ex. 13 at p. 1). The evaluation report noted that the January 2020 developmental pediatric evaluation results indicated that the student "appear[ed]" to meet the criteria for an ASD diagnosis, and therefore, an evaluation using the ADOS-2 was requested by the district "to provide additional information to determine if [the student's] behaviors are consistent with a diagnosis of Autism" (*id.*). Following direct observation, administration of standardized testing measures and review of information obtained from the parents, the independent neuropsychologist concluded that the

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<sup>1</sup> The parent testified that she did not know whether the student was declassified at that time (*see* Tr. pp. 435-36).

<sup>2</sup> The student's December 2019 IEP was not made part of the hearing record (*see* Parent Exs. A; B-10-B-11; L-R; T-V; Dist. Exs. 1-13).

student met the diagnostic criteria for ASD, "Level 1: requiring support, which is the mildest severity rating" (*id.* at p. 10).

The CSE convened on June 2, 2020, to formulate the student's IEP for the 2020-21 school year (first grade) (Dist. Ex. 2). The CSE determined that the student was eligible for special education and related services as a student with autism and for the 10-month school year recommended programming consisting of both individual and group OT and speech-language therapy, weekly behavioral consultation services, small group social skills counseling, parent training and counseling, and various supplemental aides and program modifications (*id.* at p. 8). The CSE also determined that the student was eligible to receive group OT services during summer 2020 (*id.* at p. 9).

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

In a due process complaint notice dated July 20, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (*see* IHO Ex. I at p. 3). The parent specifically alleged that the district "willfully disregarded a comprehensive diagnostic report" by a developmental pediatrician, initially failed to classify the student as eligible for special education as a student with autism at the February 6, 2020 CSE meeting, and, after correctly determining the student's eligibility as a student with autism at the June 2, 2020 CSE meeting, failed to recommend that he receive 1:1 paraprofessional services in an integrated setting (*id.*). As relief, the parent requested that the student's IEP be modified to include specific recommendations from evaluators, including that the student receive: 1:1 paraprofessional and integrated co-teaching (ICT) services, push-in services, daily pragmatic/social skills intervention, applied behavior analysis (ABA)-based interventions, and a variety of classroom management strategies, as well as that the parent and teacher have regular contact about the student's progress (*id.* at pp. 4-5; *see* Parent Ex. Q at p. 1).<sup>3</sup> The parent also requested that "[i]f the ICT classroom is deemed to be too overstimulating for [the student], a smaller setting or a specialized private school may be more appropriate" (*id.* at p. 5).

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

An impartial hearing convened on September 14, 2020 and concluded on October 29, 2020 after six days of proceedings (Tr. pp. 1-590). In a decision dated December 21, 2020, the IHO reviewed the factual history of the matter including documentary evidence such as results of the student's evaluations (IHO Decision at pp. 7-13), recounted witness testimony (*id.* at pp. 13-29), and described the district's obligations regarding the provision of a FAPE (*id.* at pp. 29- 31). The IHO identified the parent's allegations during the hearing regarding the June 2020 CSE meeting and resultant IEP as 1) the district's witnesses were not credible, 2) the parent was not able to fully participate during the CSE meeting, 3) the CSE disregarded recommendations as to the student's deficits and needs, 4) the CSE insufficiently reflected the student's deficits and needs in the IEP, and 5) the CSE recommended a general education class with insufficient supports (*id.* at p. 31). The IHO identified the parent's requested relief at the impartial hearing as being consistent with

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<sup>3</sup> The parent attached a number of documents to the due process complaint notice, many of which were also admitted as separate exhibits at the impartial hearing (*compare* IHO Ex. 1 at pp. 6-65, *with* Dist. Exs. 2; 5; 11; 13).

that requested in her due process complaint notice (compare IHO Decision at p. 6, with IHO Ex. I at pp. 4-5).

In her decision, the IHO determined that the district witnesses were credible (IHO Decision at p. 34). The IHO also determined that the parent was able to participate in the June 2020 CSE meeting—noting that her counsel was also present, the CSE changed the student's eligibility category upon the parent's request, and the IEP included the parent's concerns and recommended supports and services from the evaluation reports provided by the parent (id. at pp. 33-34). In her decision, the IHO acknowledged that "[a]lthough not specifically alleged by the parent as a claim demonstrating a denial of a FAPE," the June 2020 "CSE reviewed sufficient evaluative data to determine the student's deficits and needs in order to develop an appropriate program" noting that some of the accommodations and strategies included in the IEP were also recommended in the privately obtained evaluations (id. at p. 34). The IHO found that the IEP "listed the student's deficits, as described by the parent and privately obtained evaluations" (id. at p. 33). The IHO also determined that there was no evidence that the parent had agreed to an FBA and BIP, and that it was "reasonable and appropriate for the [d]istrict to again recommend an FBA and BIP in [the] June 2, 2020 IEP and that their inclusion in the IEP addressed the student's behavioral needs" (id. at p. 35).

Next, the IHO found that the June 2020 IEP "provided the student with a program that would meet his needs in the LRE," noting that "[a]lthough an ICT, special class or 1:1 aide may have been recommended in private evaluations" the parent obtained, the district was "not required to automatically mandate in the student's IEP" the private clinicians' recommendations, "if less restrictive recommendations that will provide the student with the special education services he needs can be implemented" (IHO Decision at p. 36). According to the IHO, at the time of the June 2020 CSE meeting, "the student did not require an ICT or special class or a 1:1 aide" and based on the hearing record, the student "still does not require the more restrictive services," reiterating testimony from district staff to that effect (id. at pp. 36-37). While the IHO sympathized with the parent that the student appeared to behave differently outside of school, she determined that it was "reasonable for the [d]istrict to create an IEP based on the student's academic levels and behavior observed by its staff," and that although during remote learning the student's behavior could not be monitored as clearly as when he was in the classroom, she did not find that inability warranted an ICT or individual learning class (ILC), or 1:1 aide services (id. at p. 37).<sup>4</sup> In conclusion, the IHO found that "the IEP prepared by the [d]istrict during its June 2, 2020 CSE meeting was appropriate and provided the student with special education services that would meet his special education needs" such that the district offered the student a FAPE for the 2020-21 school year (id. at pp. 32, 38). The IHO then determined that "as requested by the [d]istrict" it was "appropriate for the CSE to reconvene" to consider a specific neuropsychological evaluation report and the August 26, 2020 letter from a private evaluator, "along with any other relevant documents concerning the student's needs and determine if a new IEP is required" (id. at p. 38). She ordered the CSE to "immediately reconvene" as directed and denied all of the parent's other requests for relief (id.).

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<sup>4</sup> The hearing record described the ILC or individual learning class as an in-district, self-contained 15:1 special class placement (see Tr. pp. 266, 342-43; Dist. Ex. 3 at p. 2).

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

The parent's allegations in the request for review and which issues are properly raised on appeal will be more fully discussed below. The issues that need to be determined on appeal are whether the IHO erred by not finding that the CSE failed to consider the student's January 2020 developmental pediatric evaluation report, and whether the IHO erred in determining that the June 2020 IEP offered a FAPE when it failed to provide the student with ICT and 1:1 paraprofessional services.

In an answer, the district responds to the parent's allegations with denials and argues that the request for review does not comply with State regulations and improperly raises issues that were not raised in the due process complaint notice. Further, the district asserts that the IHO's decision should be upheld in its entirety and requests that the undersigned dismiss the parent's appeal.<sup>5</sup>

In a reply, the parent asserts that she stated her claims on appeal clearly and to the best of her ability, and argues that exhibit B attached to the district's answer should be disregarded, as it was related to a CSE meeting that occurred after the IHO issued her decision in the instant matter. The parent provides further argument regarding her claim that the IHO improperly allowed a district witness to provide rebuttal testimony, and asserts claims regarding her receipt of and the accuracy of one of the written transcripts from this proceeding.<sup>6</sup>

#### **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

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<sup>5</sup> The district attaches two exhibits to the answer: Exhibit A is the December 21, 2020 IHO Decision, and Exhibit B is a January 19, 2021 prior written notice regarding a January 15, 2021 CSE meeting (see Answer Exs. A; B).

<sup>6</sup> The parent attaches three lettered exhibits to the reply, consisting of emails between the parties and the court reporter and a police report, all of which are dated after the IHO issued her December 21, 2020 decision in this matter (see Reply Exs. A; B; C). In a letter to the Office of State Review dated February 11, 2020, the district requests that the undersigned reject the parent's reply for failure to comply with practice rules, failure to address affirmative defenses in the district's answer, and for "demonstrating an emerging pattern of harassing, vexatious and frivolous behavior" by the parent against the district and its counsel.

York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>7</sup>

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Scope of the Impartial Hearing and Review**

As an initial matter, it is necessary to identify which of the parent's arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The parent raised an issue in her due process complaint notice that was not addressed by the IHO, but neither party advanced or addressed the issue in this appeal. Specifically, the parent asserted in her due process complaint notice that the CSE failed to classify the student as a student with autism at the February 2020 CSE meeting (IHO Ex. I). To the extent the parent does not raise arguments on appeal regarding this claim which was alleged in the due process complaint notice and not addressed by the IHO, that claim is deemed abandoned and will not be further addressed (8 NYCRR 279.8[c][2], [4]).

In addition to the unappealed issue above, the parent also attempts to assert new claims in her request for review for the first time in this State-level review proceeding, specifically, that the IHO failed to rule that 1) the March 2020 psychological diagnostic evaluation was inappropriately conducted, 2) when the parent initially requested to have the student evaluated she was told to wait

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<sup>7</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).



which was a violation, 3) the parent was "never granted a CSE meeting" when she requested one, and 4) the February 2020 IEP was not appropriate.<sup>8</sup>

However, the parent did not raise these issues in her due process complaint notice, nor did the IHO address these issues and, therefore, they are improperly raised for the first time on appeal (see IHO Ex. I). 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]). Here, prior to the commencement of witness testimony, the IHO offered the parent the opportunity to amend the due process complaint notice, which the parent declined (see Tr. pp. 111-20). Additionally, the parent identified her allegations regarding the CSE's lack of consideration of the January 2020 developmental pediatric evaluation report, the sufficiency of the June 2020 IEP present levels of performance, and the June 2020 CSE's failure to recommend ICT and 1:1 paraprofessional services during her opening statement (see Tr. pp. 379-82). Further, during the course of the proceedings the parent did not seek the district's agreement, nor did the district agree to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice to add these claims (see, e.g. Tr. pp. 142-43, 208-10, 288-90, 361-63; Answer ¶ 16). Nor can it be said that the district "opened the door" to these claims by raising evidence as a defense to claims that were not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Therefore, I will not review these issues raised for the first time on appeal.

## 2. IHO Impartiality and Witness Credibility

On appeal the parent alleges that it was "unfair" for the IHO to allow the district to call a rebuttal witness. The parent also argues that the IHO was not impartial when determining that the

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<sup>8</sup> Although finding the student eligible for special education, the only allegation in the due process complaint notice regarding the February 2020 IEP was that the district "originally failed or refused to classify [the student] as a student suffering from an Autism Spectrum Disorder on a CSE meeting on February 6, 2020" (IHO Ex. 1 at p. 3). However, there are no other specific allegations with respect to that IEP, and the United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]; see also, Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting that that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because an IEP must be tailored to the child's specific needs based upon an individual evaluation of the student]). To the extent the parent's claim in the due process complaint notice regarding the February 2020 CSE's failure to classify the student as a student with autism at that time could be broadly interpreted to encompass the claims she attempts to raise on appeal—that the IHO failed to rule the February 2020 CSE refuted an evaluation report and the resultant IEP was not appropriate—as further described below, the hearing record shows that it was considered and there is nothing to suggest that the IEP would have been materially different even if the CSE had selected the parent's preferred disability category as a descriptor. The hearing record also shows that the June 2020 CSE determined that the student was eligible for special education as a student with autism, and the June 2020 IEP superseded the February 2020 IEP as the student's program and placement for the 2020-21 school year (see Dist. Ex. 2). As such, while this decision includes factual references regarding what occurred during the February 2020 CSE meeting, any newly raised arguments regarding the February 2020 CSE meeting and resultant IEP will not be further addressed.

district witnesses provided credible testimony, upon which the parent asserts the IHO "unfairly placed much weight".

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

The parent contends that the IHO inappropriately allowed the district to call a rebuttal witness. According to the parent, although timely disclosed as a potential witness, the district did not call the student's 2019-20 school year classroom teacher during the presentation of its direct case, and therefore should not have been allowed as a rebuttal witness because the parent had not "present[ed] any new evidence." However, unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

In the instant matter, the hearing record does not show that the IHO demonstrated bias in favor of the district by allowing a rebuttal witness. During the proceeding, the district presented three witnesses during its case in chief: the director of special education, the behavior consultant, and the school psychologist (see Tr. pp. 170-378). At the conclusion of the school psychologist's testimony, counsel for the district informed the parent and the IHO that although "the district [was] resting its case in chief and its presentation of witnesses," the district "reserve[d] the right to present rebuttal witnesses," which was "dependent purely on the witnesses presented by the family" (Tr. p. 378). During her direct testimony, the parent testified that prior to the June 2020 CSE meeting the student's kindergarten teacher informed her that the student would benefit from "one-on-one support and also ABA services" (Tr. p. 425). The parent also stated that the student's kindergarten

teacher had reported that the student was rigid at school and that he "sometimes" needed continuous redirection (Tr. pp. 427, 429). Regarding the June 2020 progress and goal report, the parent testified that she disagreed with the kindergarten teacher's statement that the student was "at age level in terms of striving to produce high quality work, and [was] committed to growth" including that his writing was at "age level" as she did not observe that level of performance during the period of time the student received remote instruction (Tr. pp. 431-32).

Additionally, regarding a parent exhibit that had originally been excluded from evidence, the IHO reconsidered that ruling and admitted Parent Exhibit N into the hearing record, images of text messaging (Tr. pp. 440-41). Counsel for the district argued that the text communications should not be admitted, as the text messages contained in the exhibit did not indicate a date or time, nor did they reflect that the kindergarten teacher was the sender/recipient (Tr. pp. 441-42). As such, the IHO indicated that the district's counsel could ask the witness about the text messages, and that she would consider allowing an additional witness to testify about the "new evidence" (Tr. pp. 442-43). At the conclusion of the parent's case, the parties discussed the district's request to present the student's kindergarten teacher as a rebuttal witness "to respond and to explain the now admitted into evidence Parents' Exhibits N-7 through N-10, as well as to respond to [the] parent[']s direct testimony and provide context for that," noting that the teacher had been previously disclosed as a witness in the district's five-day disclosure "so there should be no harm to the parties" (Tr. pp. 502-03). The IHO then asked the parent for her input regarding allowing the rebuttal witness, to which the parent responded that she had "no problem" with the kindergarten teacher testifying about the text messages, although she questioned whether it was "fair" to allow the witness at that point in the proceeding (Tr. pp. 504-05). The IHO explained to the parent that rebuttal testimony could be based on testimony presented by someone else during the hearing; as an example, reiterating the parent's testimony about conversations she had with the kindergarten teacher (Tr. pp. 505-06). At that point, the parent stated that "[i]f that's how it works, yes, I have no problem with that. That's fine" and acknowledged her understanding that she would be allowed to cross-examine the witness (Tr. pp. 506-07).

Given the circumstances described above, there was no abuse of discretion by allowing a rebuttal witness as it was well within the scope of the authority of the IHO. A review of the hearing record demonstrates that the parent had the opportunity to present evidence and arguments in support of her requests for relief and that the IHO conducted the impartial hearing in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Accordingly, the evidence in the hearing record does not show that the IHO exhibited bias against the parent.

Turning to the issue of witness credibility, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Although the parent is of the opinion that the district witness' testimony was "unreliable" and there was "clearly

inconsistency," in this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion to the IHO with regard to her determination of the credibility of the witnesses.

## **B. FAPE**

### **1. June 2020 CSE Meeting Process**

Turning to the first issue on appeal, the parent alleges that the IHO erred in finding that the June 2020 CSE reviewed sufficient evaluative data, specifically alleging that the CSE failed to consider the student's January 2020 developmental pediatric evaluation report. The IDEA requires that in developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

A CSE must also consider IEEs obtained at public expense and private evaluations obtained at private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight (T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993], citing G.D. v. Westmoreland Sch. Dist., 930 F.2d 942, 947 [1st Cir. 1991]; see Michael P. v. Dep't of Educ., 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; K.E. v. Indep. Sch. Dist. No. 15, 2010 WL 2132072, at \*19 [D. Minn. May 24, 2010]; James D. v. Bd. of Educ., 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]). Although a CSE is required to consider reports from privately retained experts, it is not required to adopt their recommendations (see, e.g., G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at \*19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 2005 WL 1791533 [2d Cir. July 25, 2005]; see also Pascoe v. Washingtonville Cent. Sch. Dist., 1998 WL 684583, at \*6 [S.D.N.Y. Sept. 29, 1998]; Tucker, 873 F.2d at 567; Application of the Dep't of Educ., Appeal No. 12-165).<sup>9</sup>

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<sup>9</sup> It is well settled that a CSE need not adopt the recommendations from a private evaluation in order to satisfy its obligation to consider a private evaluation (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

However, neither the IDEA nor State law requires a CSE to "consider all potentially relevant evaluations" of a student in the development of an IEP or to consider "every single item of data available" about the student in the development of an IEP (T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013], quoting F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581-82 [S.D.N.Y. 2013]; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP, and that the failure to memorialize which evaluative information the CSE reviewed constituted a "serious procedural violation"]); M.Z., 2013 WL 1314992, at \*8). In addition, while the CSE is required to consider recent evaluative data in developing an IEP, so long as the IEP accurately reflects the student's needs, the IDEA does not require the CSE to exhaustively describe the student's needs by incorporating into the IEP every detail of the evaluative information available to it (20 U.S.C. § 1414[d][3][A]; see M.Z., 2013 WL 1314992, at \*9; D.B. v. New York City Dep't of Educ., 2011 WL 4916435, at \*7-\*9 [S.D.N.Y. Oct. 12, 2011]).

The parent alleges that the CSE failed to consider the January 2020 developmental pediatric evaluation report; however, the evidence in the hearing record does not support that assertion. The parent testified that she provided the January 2020 developmental pediatric evaluation report to the district and requested a CSE meeting to review the results (Tr. p. 421). On February 6, 2020 the CSE convened and the parent attended with her advocate (Tr. p. 421; Parent Exs. M at pp. 19-20; P). In a February 6, 2020 letter to the director, the parent's advocate summarized the events of the CSE meeting held that day, including that "[t]he review of the [d]evelopmental [p]ediatric [r]eport led the committee to agree to a change in classification from speech/language impaired to other health impaired as this more accurately describe[d] [the student]," and that the resultant IEP would "reflect that he has ADHD combined type and appears to have [ASD]" (Parent Ex. M at p. 19; see Dist. Ex. 11 at p. 8).

According to the parent, the district refused her request to change the student's eligibility classification to autism based on the developmental pediatrician's report, because it only "appear[ed]" that the student met the criteria for ASD (Tr. pp. 421-22; see Dist. Ex. 11 at p. 8). Further, the parent testified that the school psychologist "went on to say that the ASD diagnosis wasn't done using a method called the ADOS" and that the district recommended that the parent obtain the district's "outside contracted provider to conduct an ADOS evaluation to validate the ASD diagnosis by [the developmental pediatrician]" (Tr. p. 422).

The February 6, 2020 prior written notice reflects that the CSE changed the student's eligibility classification from speech or language impairment to other health impaired "based upon the report from the developmental pediatrician and discussion about functional abilities within the school setting" (Parent Ex. Q at p. 1). Consistent with the parent's testimony, the notice further indicated that "[t]he evaluation from the developmental pediatrician, provided by the parent was reviewed which indicated that [the student] 'appears' to meet the criteria for ADHD combined type and [ASD]" (*id.*). The CSE recommended "further testing based on the findings of the report provided by the parent from a developmental pediatrician, to rule out [ASD]" (*id.* at p. 2). The June 2020 IEP "[s]pecial [a]lerts" reflect that the January 2020 developmental pediatric evaluation

report "indicate[d] that [the student] 'appears' to meet the criteria for the diagnosis of ADHD, combined type and Autism" (Dist. Ex. 2 at p. 1).<sup>10</sup>

The parent testified that the February 2020 CSE "didn't actually really go over [the developmental pediatrician's] report and the contents inside," rather, it was her view that the CSE "just wanted to talk about the recommendations, but the contents, it was never discussed by anybody" (Tr. pp. 437-38). The assertion that the district failed to "consider" the January 2020 report is undermined insofar as the parent also argued that the district "refuted" the results of the evaluation, which the parent believed should have led the CSE to conclude that the student was eligible for special education under the disability category of autism. However, the district personnel were of the view point that it would be better to have additional evaluative information before reaching that particular conclusion. Given the above, the hearing record shows that the CSE did consider the January 2020 developmental pediatric evaluation report, despite the parent's disagreement with the outcome of that discussion (compare Tr. pp. 423, 437-38, with Parent Ex. M at pp. 19-20 and Parent Ex. Q at pp. 1-2).

With regard to the June 2020 CSE meeting, the director of special education (director) testified that the June 2020 CSE reviewed the March 2020 psychological diagnostic evaluation report of the administration of the ADOS-2 to the student, the progress the student was making toward his IEP annual goals, the recommendations from the related service providers for the upcoming school year, and the student's performance during remote instruction (Tr. pp. 172, 177-79; see Dist. Exs. 3 at p. 2; 13).<sup>11</sup> According to the director, based on the results of the March 2020 psychological diagnostic evaluation, the CSE changed the student's eligibility classification to autism and recommended parent counseling and training services (Tr. p. 179; see Dist. Ex. 2 at pp. 1, 8). Although it does not appear that the June 2020 CSE further considered the January 2020 developmental pediatric report at the June 2020 CSE meeting, the CSE acknowledged that the student had received a diagnosis of autism—which was one of the outcomes the parent sought following the January 2020 developmental pediatric evaluation—and the CSE was not required to retrace its steps over ground it previously covered, especially in light of the newly acquired evaluative information that it had for review.

## **2. June 2020 IEP**

### **a. Present Levels of Performance**

Next, the parent argues that the IHO erred in finding that it was reasonable for the CSE to develop the student's June 2020 IEP "based on the student's academic levels and behavior observed

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<sup>10</sup> The February 2020 and the June 2020 IEPs do not reflect the January 2020 developmental pediatric evaluation in the list of evaluation results, which may have contributed to the parent's perception that the report was not considered (see Parent Ex. P at pp. 1-3; Dist. Ex. 2 at pp. 1-4).

<sup>11</sup> The director testified that it "may have just been a clerical error" that the March 2020 psychological diagnostic evaluation report was not reflected in the June 2020 IEP as the CSE "certainly reviewed it at the meeting" (Tr. pp. 206-07). Similar to the situation with the January 2020 developmental pediatric evaluation report, to avoid confusion over what information the CSE based the IEP upon, in the future, the district is encouraged to take care to include the evaluative information the CSE considered in a student's IEP.

by its staff" and asserts the CSE failed to include certain evaluative information in the IEP present levels of performance.

Among the other elements of an IEP is a statement of a student's academic achievement and functional performance and how the student's disability affects his or her progress in relation to the general education curriculum (20 U.S.C. § 1414[d][1][A][i][I]; 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; see 8 NYCRR 200.1[ww][3][i]). In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The director testified that the June 2020 CSE developed the student's present levels of performance using input from the classroom teacher and related service providers, progress toward his goals, and his classroom performance, and that it was an accurate reflection of what was discussed about the student during the meeting (Tr. pp. 198-200; see Dist. Ex. 3 at pp. 1-2). Review of the June 2020 IEP present levels of performance shows that it indicated the student's "academic skill levels and learning abilities [were] within expectations" (Dist. Ex. 2 at p. 5). Specifically, the student's strongest area was math, in that he understood "most math concepts and [could] compute math equations mentally" (*id.*). With regard to reading, at the time the June 2020 IEP was developed, the student was "reading a level D which [was] the benchmark for Kindergarten at the end of the year" (*id.*). He benefitted from scaffolding of multistep directions, and visual aids (*id.*).

Regarding speech-language skills, the June 2020 IEP stated that the student expressively displayed appropriate vocabulary on specific tasks, although he had difficulty telling differences between two nouns and providing a specific word he wanted to use in conversation or during unstructured tasks (Dist. Ex. 2 at p. 4). The student's narratives could be "unclear," as they contained grammatical and sequencing errors, although he had exhibited progress telling a story with pictures and a model, and in using pronouns (*id.*). Receptively, the IEP indicated that the student understood basic directions, although attention and motivation at time affected his "actual ability" (*id.*). He exhibited difficulty answering some WH questions—specifically 'when' and 'why'—after hearing a story read aloud, but was better able to answer 'where' questions (*id.*).

According to the June 2020 IEP, socially the student maintained eye contact and "relative focus in the 1:1 environment," although it was more difficult for the student to wait his turn and make conversation in the group setting, and he had some difficulty solving pragmatic and social problems at times (Dist. Ex. 2 at p. 4). He was described as a "sweet" boy who "often enjoy[ed] playing alone or at times with one other friend during choice time" and who was motivated to participate with his peers (*id.* at p. 5). The IEP indicated that the student's "attention and eye contact during lessons and conversations [was] fleeting," and that he "may require redirection to stay on tasks and complete assignments" (*id.*). At times, the student independently chose to work at a different work space other than his desk, and "prefer[ed] to sit on a 'smart spot' on the carpet such as a mini couch or square chair" (*id.*). His ability to sustain a conversation or answer questions with a relative response was at times inconsistent (*id.*). The IEP indicated that the student was "responsive to the prompts and redirection provided in the classroom" and that a "behavior plan

ha[d] been developed to reinforce and increase on-task behavior" (id.). Additionally, the IEP indicated that the student "respond[ed] to positive praise and reinforcement such as a token economy" (id.). The CSE identified areas of need of improvement, including the student's attention skills, awareness of his behaviors, and conversation skills, and that he needed to decrease his impulsivity (id.). Additionally, the CSE determined that the student needed positive behavioral interventions, supports, and other strategies to address behaviors that impeded the student's learning or that of others, and recommended a BIP "to decrease impulsivity, increase on-task behaviors, increase attention and identify how his behavior impacts his functioning" (id. at p. 6; see Dist. Ex. 10).

In the area of physical development, the June 2020 IEP indicated that the student began receiving OT services in January 2020, and during individual sessions was "able to maintain good attention to functional tabletop activities with prompting," noting that the student was "extremely social and enjoy[ed] working in a group" (Dist. Ex. 2 at p. 5). The student also enjoyed "proprioceptive input which he obtain[ed] through the trampoline, tunnel, crash pad and obstacle courses" (id.). According to the IEP, the student "continue[d] to benefit from verbal prompts to maximize bilateral integration during therapeutic activities," and his bilateral integration skills continued to emerge, as "evidenced by improvements when manipulating items with prompting" (id.). The student also cut a straight line with a visual cue and verbal prompts to orient his scissors correctly, enjoyed tracing and copying the letters of his name, and "continue[d] to make progress in improving his letter formation, line targeting and orientation skills" (id.). The CSE identified that the student needed to improve his body awareness, sensory integration skills, and visual motor skills for graphomotor tasks (id. at p. 6).

The parent is correct in stating that the present levels of performance in the June 2020 IEP do not specifically attribute the student's identified needs as "parent concerns," and in the request for review the parent provides examples of evaluative information she argues was not made part of the June 2020 IEP; including that the student exhibited difficulty with self-regulation, attention, hyperactivity, distractibility, sensory integration, appropriate use of language, and social interactions (see Req. for Rev. at pp. 3-5; Dist. Ex 2 at pp. 4-6). However, as discussed above, the June 2020 IEP did describe the student's difficulties in these areas, although perhaps not to the same degree the parent experienced them in the home setting, and review of the information available and reported to the June 2020 CSE shows that it is consistent with the student's present levels of performance in the June 2020 IEP (compare Dist. Ex. 2 at pp. 4-6, with Tr. pp. 172, 177-79, 542-44; Parent Ex. V at pp. 4, 6; Dist. Exs. 7; 8; 13 at p. 10). It was not inappropriate for the CSE to emphasize the student's school-based experiences in the present levels of performance. As such, although the IEP present levels of performance may not have included the exact detail or description regarding the student's needs that the parent may have preferred, review of the evidence does not provide a basis to overturn the IHO's finding that it was "reasonable for the [d]istrict to create an IEP based on the student's academic levels and behavior observed by its staff," or that the district had reviewed sufficient evaluative information in order to identify the student's needs (see IHO Decision at pp. 34, 37).



## **b. General Education Setting with Related Services**

With regard to the special education services identified in the student's IEP, the parent asserts that the IHO erred in finding that the June 2020 IEP was appropriate to meet the student's needs in the absence of ICT and 1:1 paraprofessional services as recommended by private and independent evaluators. Review of the evidence in hearing record as a whole, however, supports the IHO's conclusion that the June 2020 IEP supports and services were sufficient to address the student's special education needs.

As noted above, the hearing record shows that the June 2020 CSE reviewed the March 2020 diagnostic evaluation report and subsequently changed the student's eligibility classification to autism, due to his needs related to social reciprocity, nonverbal communication, and social interaction (Tr. pp. 177-79, 335-36; Dist. Ex. 3 at p. 1). After identifying the student's needs as described above, the June 2020 CSE determined that the student "required the additional support of special education services to receive educational benefits within the general education setting" (Dist. Ex. 2 at p. 6).<sup>12</sup> According to the school psychologist, the student's delays in speech-language, motor, and attention skills were "the primary reasons for there to be interference in [the student's] participation in age-appropriate activities at the time the IEP was written" (Tr. p. 373). Therefore, the CSE developed annual goals to improve the student's speech-language skills, motor skills, and social/emotional functioning, and determined that a general education program with related services would meet his needs (*id.* at pp. 7-8). Specifically, the June 2020 CSE recommended that the student receive two 30-minute sessions per six-day cycle of speech-language therapy in a small group, one 30-minute session per six-day cycle of individual speech-language therapy, one 30-minute session per six-day cycle each of individual and small group OT, one 60-minute session per week of behavioral consultation services, one 30-minute session per week of social skills counseling in a small group, and one 60-minute session per month of parent counseling and training (*id.* at p. 8). The CSE also recommended the supplementary aids and program modifications of movement breaks, preferential seating near the point of instruction, access to flexible seating, and sensory integration strategies; all as needed throughout the school day (*id.*).<sup>13</sup> The IEP also provided that the student would receive 12-month OT services during July and August 2020 (*id.* at p. 9).

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<sup>12</sup> During the impartial hearing the parent questioned whether the CSE had recommended "special education services" because it recommended related services for the student (*see* Tr. pp. 274-75; Dist. Ex. 2 at pp. 6, 8). The behavior consultant testified that "[a] related service is a special ed[ucation] service so that would be OT, social skills, behavioral consultation" (Tr. p. 275; *see* Dist. Ex. 2 at p. 8). Special education includes "[s]peech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards" (300.39[a][2][i]), and under State law, related services are, in and of themselves, included in the definition of special education (Educ. Law § 4401[2][k]; *see* 8 NYCRR 200.1[ww], [xx]). Thus, a program consisting of related services only is not per se an inadequate program. This feature of State policy permits students who can benefit from related services only to enjoy the procedural safeguards of the IDEA whereas a similarly situated student in another state might not meet the eligibility requirements for special education in those states that do not include related services in the definition of special education.

<sup>13</sup> Although the June 2020 CSE did not adopt all of the developmental pediatrician's recommendations from her January 2020 report, the June 2020 IEP did include her recommendations for preferential seating close to the teacher, movement breaks, positive behavior interventions, individual and group speech-language therapy, OT,

Turning to the recommended placement, the director testified that the CSE considered the progress the student had made during the 2019-20 school year—when he was in a general education kindergarten class and received OT, speech-language therapy, behavioral consultation and social skills group therapy—and that "academically" the student had "performed very well" in math and reading (Tr. pp. 176-77, 179-80, 230-31). The student's kindergarten teacher testified that during the June 2020 CSE meeting she spoke about the student's academic skills; that he had struggled at the beginning of the year with reading and writing, but by June 2020 "he was performing on benchmark in regards to reading and math" (Tr. pp. 541-43). Although the student struggled with writing due to his "OT needs," by June 2020 the student was able to independently "write appropriately" (Tr. p. 543).

The prior written notice shows that the June 2020 CSE considered a 15:1 ILC special class placement, which it deemed too restrictive, and ICT services (Dist. Ex. 3 at pp. 1, 2). ICT services are defined as "specially designed instruction and academic instruction provided to a group of students with disabilities and nondisabled students" in a classroom staffed "minimally" by a "special education teacher and a general education teacher" (8 NYCRR 200.6[g]). ICT services provide for the delivery of primary instruction to all of the students attending such a setting ("Continuum of Special Education Services for School-Age Students with Disabilities," at pp. 14-15). The CSE determined ICT services were "too restrictive" due to the teacher's report that the student was "functioning on or above grade level in all academic areas" (Dist. Ex. 3 at p. 2).<sup>14</sup> The director testified that the recommendation that the student remain in a general education setting was based on "the feedback from the teacher in terms of where [the student] was academically," and that students who received ICT services "tend[ed] to have more academic deficits, and we didn't see that with [the student]" (Tr. pp. 191-93).<sup>15</sup> The school psychologist testified that the student's "academic needs were not at a level that required the support of an ICT program," as with ICT services, "our primary concern is academics" (Tr. p. 374). Rather, the June 2020 CSE determined that the student's needs could be met with related services while remaining in the general education classroom setting (Tr. pp. 217, 265-66, 340-41, 545; Dist. Ex. 3 at p. 2).

According to the evidence in the hearing record, the June 2020 CSE recommended that the student receive OT services to address his body awareness, sensory integration, visual motor, and

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and social skills group counseling (compare Dist. Ex. 2 at pp. 6, 8, with Dist. Ex. 11 at p. 8).

<sup>14</sup> Although a restrictiveness rationale was used by the district's staff, that particular part of their reasoning is not persuasive because ICT services are already provided in a setting with non-disabled peers who are receiving general education instruction. State regulations clarify that ICT services are permissive in nature and are "provided to a group of students with disabilities and nondisabled students" (8 NYCRR 200.6 [g]). Thus, there is no material difference in terms of restrictiveness. This misapplication of the LRE principle on the part of district staff is not fatal however, because for the reasons described herein, the general education setting with the support of related services and other accommodations were appropriate to address the student's needs.

<sup>15</sup> Although not part of a student's IEP planning process, State regulations require that the special education students placed together for purposes of special education shall be grouped by similarity of individual needs (8 NYCRR 200.6[a][3]), thus, while general education settings do not typically have any grouping requirements for a district to address, a school district must also balance such requirements when assigning disabled students to specific teachers or classrooms that provide ICT services.

graphomotor skills (Dist. Exs. 2 at pp. 7, 8; 3 at p. 1). Speech-language therapy was recommended to address the student's receptive, expressive, and pragmatic language deficits (Tr. p. 338; Dist. Exs. 2 at pp. 7, 8; 3 at p. 1). The CSE also recommended social skills counseling, which the behavior consultant described as herself, the social worker, and the school psychologist pushing into the student's activities such as lunch and recess, to "work on pragmatic language and social skills" (Tr. pp. 266-67). Social skills counseling was also recommended to improve the student's conversational skills, attention, and awareness of his behaviors (Dist. Ex. 3 at p. 2). Further, the hearing record shows that due to the parent's concerns, the June 2020 CSE increased the amount of behavioral consultation services it had previously offered (Tr. p. 264; Parent Ex. P at p. 6; Dist. Exs. 2 at p. 8; 3 at p. 2). The behavior consultant described that service as "a push-in model to the classroom," in which she worked "directly with the student during the school day" and a "pull-out model to teach the student skills in isolation depending on the need of the student" (Tr. p. 264). Additionally, the behavior consultant pushed into special areas such as art, gym, music, lunch and recess to work on pragmatic and social skills (*id.*). Behavioral consultation services also entailed the consultant observing the student to take data; meeting with, consulting, and coaching the teacher regarding positive strategies for the student; implementing and monitoring the BIP; and reviewing the BIP with the student's parents and district staff (Tr. pp. 185-86, 233-38, 264-65).

To the extent that the parent's request for ICT services was based upon the January 2020 recommendation by the developmental pediatrician, she stated in her report that the student "require[d] placement in a class that is cognitively challenging yet supportive," with a "low student to teacher ratio and access to a special education teacher in the classroom;" suggesting that "[p]lacement in an integrated class may be appropriate at this time" (Dist. Ex. 11 at p. 8). The January 2020 developmental pediatric evaluation report reflected a school report prepared by the student's teacher, which indicated at that time, the student's word recognition and numerical skills were average, but his reading comprehension, spelling, and writing skills were below average/unsatisfactory (*id.* at pp. 7, 8). However, the developmental pediatrician's assessment of the student also yielded a finding that his "[e]arly reading skills seemed to be appropriate for a Kindergarten level," and although the student had some difficulty with math computation, "math concepts seemed to be appropriate for a Kindergarten level" (*id.* at pp. 5, 8). As described above, by June 2020, the student's reading and math skills continued to be at grade level, and his writing had improved (Tr. pp. 541-43). While academic needs are not the only reason that a CSE may recommend ICT services for students with disabilities, in this instance, the hearing record supports the IHO's finding that the student did not require such services in order to receive an appropriate educational program.

Turning next to the parent's assertion that the student required 1:1 paraprofessional support, the kindergarten teacher testified that at the beginning of the 2019-20 school year, the student exhibited disruptive behavior and "had many behavioral needs," to the extent that the kindergarten teacher was "unsure" whether she was able to support the student in her class (Tr. pp. 535, 543-44). The kindergarten teacher further testified that at the beginning and "towards the middle" of the school year, she opined that the student "needed to be in a more restrictive setting" (Tr. p. 544). The developmental pediatrician determined that in January 2020 "[g]iven significant difficulties with attention, hyperactivity, and inappropriate behaviors, [the student] requires the full time support of a 1:1 paraprofessional for refocusing and redirection" (Dist. Ex. 11 at p. 8).

In January 2020 the behavior consultant conducted an FBA, which identified the student's "off-task" behaviors; defined as "engagement in any tasks other than the assigned task or ongoing activity (i.e., looking around the room, playing with items, talking, etc.) for more than 10 seconds" (Dist. Ex. 9 at p. 1). The FBA report provided replacement behaviors, identified previous interventions, described the methods used to gather information for the FBA, reflected baseline data, provided a hypothesis as to the function of the behavior, and identified potential reinforcers for the student (see id. at pp. 1-7). On February 6, 2020, the behavior consultant developed a BIP for the student, which reiterated information from the FBA, and provided intervention goals of decreasing the student's off-task behavior, and increasing his on-task behavior and ability to gain peer/teacher attention appropriately (Dist. Ex. 10 at pp. 1-2). The BIP identified instructional strategies (teaching effective communication skills, providing visual aids to identify and communicate feelings/needs, using a "Mood Meter"), proactive strategies (providing verbal praise for appropriate behavior, a visual schedule for task completion, redirection from problem behavior, delivery of demands within three feet of the student, specific seating for learning, and a sensory diet), and reactive strategies (providing proximity and touch control, planned ignoring, and implementing 'Rubber-Band Intervention') (id. at pp. 2-4). The BIP provided specific reinforcement procedures, defined the intensity of the behavior and its effect on other students and the teacher, and identified how progress would be monitored, and emergency procedures for if the behavior "present[ed] a significant safety concern" (id. at pp. 4-5).

The hearing record shows that the February 2020 CSE recommended a BIP; however, the parent disagreed with the BIP that was developed and did not provide consent for the BIP to be implemented prior to the school closures due to COVID-19 (Tr. pp. 182, 262, 443-44; Parent Ex. P at p. 5; Dist. Ex. 3 at p. 2). Prior to the school closure, although the district did not implement the BIP, district staff implemented positive behavioral interventions with the student such as a token economy, positive reinforcement, proximity control, placement, seating, and breaks (Tr. pp. 262-63, 272, 443-44).

According to the evidence in the hearing record, the student's need for a 1:1 aide was discussed at both the February 2020 and June 2020 CSE meetings (see Tr. pp. 181, 334, 336; Dist. Ex. 3 at pp. 1-2). The prior written notice completed after the June 2020 CSE meeting acknowledged the parent's request for 1:1 aid services and indicated that the CSE rejected that request "citing its high level of restriction" (Dist. Ex. 3 at pp. 1-2). According to the notice and testimony, the CSE reviewed New York State Education Department guidance regarding determining a student with a disability's need for a 1:1 aide, at which time the CSE determined that the student did not require a 1:1 aide due to health/personal care needs, significant behavior problems with ongoing incidents of injurious behavior to self or others, or constant close proximity of an adult for direct instruction or transitions (Tr. pp. 180, 336-37; Dist. Ex. 3 at p. 2). Rather, the CSE recommended implementation of the BIP—which at that point had not been previously implemented—to increase the student's on-task behavior and attention, as the teacher had reported "positive responses based on some positive behavior intervention strategies that had been put in place" (Tr. pp. 336-37; Dist. Ex. 3 at p. 2). Additionally, in response to the parent's concerns, the June 2020 CSE recommended an increase in behavior consultation services from 30 sessions per year for one hour to one hour per week, to allow the behavior consultant to observe the student in the classroom, collect data, and support staff with the implementation of the BIP (Dist. Exs. 2 at p. 8; 3 at p. 2).

The behavior consultant, who had conducted the student's FBA in January 2020 and developed the February 2020 BIP, testified that the student had difficulty with "calling out," he was "off-task at times" because he wanted attention from peers, but that there were "times when [the student] was very much on task and compliant" (Tr. pp. 255-56; Dist. Exs. 9; 10). She also observed the student advocating for himself, sitting on a special seat during whole class lessons, transitioning well throughout the school, and being "easily redirected" by the teacher (Tr. pp. 256-57). According to the behavior consultant, the student's behavior during the 2019-20 school year "mildly" impeded his learning (Tr. p. 310). The student's kindergarten teacher testified that the student had exhibited disruptive behavior earlier in the 2019-20 school year, but that he had made "huge improvement in his behavior" between September 2019 and March 2020, in that he was "working hard to maintain [] appropriate behavior in the classroom" (Tr. pp. 535-37). By March 2020, the student was "actively working on it himself," she observed a "change in his whole demeanor," in that he "wanted to do better," pay attention, and focus (Tr. p. 537). She added that by March 2020 the student "needed very little prompting to maintain on task" (*id.*). According to the June 2020 prior written notice, the teacher reported to the CSE that that the student "require[d] minimal verbal redirection to remain on task and that he was responding positively to the reinforcement systems—the class wide positive behavior improvement plan—utilized in class before the school closure" (Dist. Ex. 3 at p. 2; see Tr. p. 337).

Therefore, based on the information available to the June 2020 CSE regarding the student's improved ability to respond to positive behavioral supports and decrease his need for redirection and refocusing over the course of the 2019-20 school year, and the CSE's concern that it had not had the opportunity to implement the student's BIP prior to recommending 1:1 aide services, the evidence supports the IHO's determination that the educational program contained in the June 2020 IEP—that provided related services including weekly behavioral consultation and a BIP as well as program modifications designed to address his attention and sensory needs—was reasonably calculated to provide educational benefits.<sup>16</sup> I would encourage the parent to take advantage of the district's willingness to implement a BIP designed specifically for him, as that intervention is likely to further assist the student.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports the IHO's determinations that the district offered the student a FAPE for the 2020-21 school year, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above. Finally, as a reminder to both parties, federal and State statutes and regulations concerning the education of students with disabilities provide for a collaborative process between parents and school districts in planning and providing appropriate special

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<sup>16</sup> Although not information available to the June 2020 CSE, and therefore irrelevant to the prospective analysis required by R.E., there is evidence in the hearing record showing that the neuropsychologist who conducted the private neuropsychological evaluation of the student in September 2020 testified that the student's BIP "looked really good, very appropriate" (Tr. pp. 450-51, 470; see Parent Ex. A), which may be of value as the parties proceed with planning going forward.

education services (see Schaffer v. Weast, 546 U.S. 49, 53 [2005] [noting that the "core of the statute" is the collaborative process between parents and schools, primarily through the IEP process]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192-93 [2d Cir. 2005]). The student in this matter is young and the parties potentially have many years ahead in which they will be required to determine appropriate educational programming for him. Therefore, I strongly encourage the parties to work collaboratively and cooperatively in this effort.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
March 8, 2021**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**